

## WTO CASE REVIEW 2001\*

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\* This *WTO Case Review* is the second in an annual series on the substantive international trade adjudications rendered by the WTO's Appellate Body. Each *Review* explains and comments on the Appellate Body reports adopted by the Dispute Settlement Body during the preceding calendar year (Jan. 1 – Dec. 31), excluding decisions on compliance with recommendations contained in previously adopted reports. The inaugural *Review* was for the year 2000. See Raj Bhala & David Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1-101 (2001).

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*Korea – Measures Affecting Imports of Fresh, Chilled,  
and Frozen Beef*

(Complaint by the United States, WT/DS161/AB/R, and  
WT/DS169/AB/R, complaint by Australia, adopted  
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## PART ONE:

### INTRODUCTION

#### I. THEMES IN THE 2001 CASE LAW

##### A. Restricting the Use of Antidumping Law

It would not be a gross over-simplification to characterize 2001 as the year in which the World Trade Organization (“WTO”) Appellate Body stood firm against the protectionist abuse of antidumping (“AD”) law. In each of the three AD cases reviewed below, the Appellate Body rendered at least one—and typically several—holdings indicating that it will not tolerate an interpretation of AD law that makes its use easy, or that allows for its use in a sloppy way. The AD weapon, the Appellate Body said in 2001, is to be deployed only under certain carefully crafted and narrowly defined conditions. These conditions are not to be taken lightly.

In the *EC – Bed Linen* case, the Appellate Body called for an end to the practice of zeroing, a methodology used by some importing countries—including the United States—in the dumping margin calculation. That is, a negative dumping margin had to be weighed along with a positive dumping margin and could not be set to a zero value in the calculation of a weighted average dumping margin. In the *Thai Steel* case, the Appellate Body made clear that in a material injury investigation, all relevant economic factors must be considered. A review that is cursory, conclusory, or incomplete is unacceptable. In the *Japan Hot-Rolled Steel* case, the Appellate Body took issue with the use of facts available against the respondent producer-exporters in certain circumstances, and it struck out against biases in the calculation of Normal Value that resulted from the automatic exclusion of low-priced sales from a respondent to an exporter. The Appellate Body also objected to a focus on the merchant market, but not the captive production market, in injury determinations, and it insisted on a rigorous causation analysis.

These holdings ought to cheer counsel for respondents in trade remedy cases and free traders generally. All but the most callous protectionist must pity them. No doubt advocates of trade liberalization are frustrated by the difficulty in obtaining trade promotion authority for the President and exhausted by the energy they had to expend to launch a new round of multilateral trade negotiations at the 9-13 November 2001 WTO Ministerial Meeting at Doha.<sup>1</sup> The Appellate Body rulings give them some comfort that they have a free trade ally—these judges of Geneva—in the battle against the excessive use of trade remedies like AD law. Conversely, counsel for petitioners, or outright protectionists, cannot be (and indeed are not) happy with the outcomes. They see an Appellate Body behaving imperiously, challenging American sovereignty with respect to the administration of trade remedies. In an era of

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1. See Raj Bhala, *Poverty, Islam, and Doha*, 36 INT’L LAW. 1 (2002) [hereinafter Bhala, *Poverty*].

declining tariff and non-tariff barriers, the Appellate Body is threatening the last great means of shutting out, or curtailing, imports—trade remedies. In that role, the Appellate Body is a villain. However, both sides can agree on at least one point: the Appellate Body’s work in 2001 gave them plenty of material for thought and debate.

### **B. Restricting the Use of Safeguards Law Too**

The Appellate Body’s approach to safeguards under Article XIX of the General Agreement on Tariffs and Trade (“GATT”), the WTO Agreement on Safeguards, and WTO Agreement on Textiles and Clothing is, if anything, even more strict than its approach to the use of national dumping laws. This approach, foreshadowed by *Argentina - Safeguard Measures on Imports of Footwear* and *Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products* in 2000, has been reinforced in three 2001 cases, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten*, *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* and *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, reviewed herein, and continues in 2002.<sup>2</sup> The only major difference between 2000 and 2001 jurisprudence is that in 2001 the United States was the responding Member in all three cases.

The relative dearth of WTO disputes over safeguards until 2000 and 2001 probably reflects in part the reluctance of most WTO members, including the United States until the second Clinton term and the George W. Bush Administration, to impose import restraints (“safeguards”<sup>3</sup>) under circumstances where serious injury as a result of imports is alleged, but where there is no evidence to demonstrate an “unfair” trade practice such as dumping or an illegal government subsidy. The United States International Trade Commission (“USITC”) conducted six safeguards investigations during the second Clinton term in 1999 and 2000, finding serious injury and recommending that President Clinton impose safeguards in four.<sup>4</sup> Actual

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2. The trend continues in *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Canada*, WT/DS202/AB/R (Mar. 2002). This and other decisions of the WTO Appellate Body and WTO panels can be found and downloaded from the WTO’s website, [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm). (last visited Mar. 27, 2002).

3. Safeguards are temporary remedies— increased tariffs, quantitative restrictions, or a combination of both— designed to permit a domestic industry to adjust to higher levels of competitive imports. They may be imposed only when increasing imports of the product cause serious injury to domestic producers.

4. In addition to *Wheat Gluten*, Inv. No. TA-201-67 (Dec. 1999) and *Lamb Meat*, Inv. No. TA-201-68 (Apr. 1999), USITC investigations were conducted in *Certain Steel Wire Rod*, Inv. No. TA-201-69 (July 1999) (3-3 vote for safeguards); *Circular Welded Steel Carbon Quality Line Pipe*, Inv. No. TA-201-70 (December 1999) (5-1 vote for safeguards); *Crabmeat from Swimming Crabs*, Inv. No. TA-201-71 (August 2000) (negative); *Extruded Rubber*

safeguards were imposed in *Wheat Gluten*, *Lamb Meat*, *Certain Steel Wire Rod*, and *Circular Welded Carbon Quality Line Pipe*.<sup>5</sup>

The Bush Administration, notwithstanding its free trade protestations, appears to have embraced the use of safeguards at least in certain circumstances. It self-initiated a broad safeguards action (under Section 201 of the Trade Act of 1974, as amended) against imported steel, something President Clinton declined to do in the final years of his administration. The USITC having found injury,<sup>6</sup> President Bush imposed safeguards in March 2002 on a wide variety of imported steel products, with additional tariffs of up to 30 percent and a series of tariff-rate quotas.<sup>7</sup> This action has been termed “the most dramatically protectionist step of any president in decades.”<sup>8</sup> Unless the United States decides to withdraw the safeguards, the steel safeguards action will certainly generate one or more WTO panel and Appellate Body decisions; as of March 21, 2002, at least nine WTO members had requested consultations with the United States, a pre-condition to seeking a dispute resolution panel under the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”).<sup>9</sup>

In *United States - Wheat Gluten*, the Appellate Body again expresses its healthy skepticism as to the usage of safeguards *per se*, given the protectionist nature of a trade remedy that permits trade restrictions in the absence of any evidence of unfair trade practices, such as dumping or subsidies. The approach again is largely technical. Here, the principal shortcoming of the competent authority’s analysis (as in *United States - Lamb Meat*) is the failure of the USITC to demonstrate that it has not attributed injury to the domestic industry to sources other than imports; a clear analysis of causation is key. All relevant factors, including but not limited to imports, must be examined and isolated, a process which is more difficult in practice than the Appellate Body would have us believe.

Also in *Wheat Gluten*, notification and consultation requirements become a more significant hurdle. “Immediate” notification under the Safeguards Agreement means just that, not several weeks later. Consultation means meaningful consultation; pro

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*Thread*, Inv. No. TA-201-72 (Dec. 2000) (negative).

5. See Proclamation No. 7273, 65 Fed. Reg. 8621 (Feb. 16, 2000) (Steel Wire Rod); Proclamation No. 7274, 65 Fed. Reg. 9193 (Feb. 18, 2000) (Quality Line Pipe); Proclamation No. 7314, 65 Fed. Reg. 34899 (May 26, 2000) (Wheat Gluten); Action Under Section 203 of the Trade Act of 1974 Concerning Lamb Meat, 64 Fed. Reg. 37393 (Jul. 7, 1999).

6. See *Steel*, Inv. No. TA-201-73, USITC Publ. 3479, Dec. 2001.

7. See Proclamation No. 7529, 67 Fed. Reg. 10553 (Mar. 5, 2002).

8. Robert Guy Matthews & Neil King Jr., *Breathing Room: Imposing Steel Tariffs, Bush Buys Some Time for Troubled Industry*, WALL ST. J., Mar. 6, 2002, at A1.

9. The nine are the EC, Japan, South Korea, Brazil, Australia, New Zealand, Norway, China and Malaysia. See Daniel Pruzin, *Steel: South Korea Joins Japan, EU in Seeking WTO Dispute Talks on U.S. Steel Measure*, INT’L TRADE DAILY (BNA), Mar. 21, 2002, at D3. Before a dispute settlement panel can be requested under Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), consultations are effectively required under Article 4.

forma or non-timely consultation is grounds for reversal of a safeguards ruling. This requires discussion of the nature of the proposed safeguards in time for a “meaningful exchange.”

The approach in *United States - Lamb Meat*, in which the Appellate Body again favors a very strict, textual based approach to the key issue of causation, is consistent. Here, in addition to requiring isolation of all causation factors, the Appellate Body disapproves of the competent authority’s definition of “domestic industry;” inclusion of the growers in the industry by the USITC, despite its logic, is a fatal flaw. Nor is panel review to be confined to issues raised by the parties before the competent authority. The Complaining Party, if it deems them relevant, may present new arguments to the WTO panel, even if the Complaining Party was a party to the administrative proceeding before the competent authority, as long as it does so in good faith.

These decisions leave several major questions unanswered. In *Wheat Gluten* and *Lamb Meat*, the requirement for determining the existence of “unforeseen developments,” originally articulated in *Korea - Dairy Products* and *Argentina - Footwear*, is again raised, and again the Appellate Body declines to provide substantive guidance as to the meaning of this language, this time on the grounds of judicial economy. However, it affirms that the competent authority must make the decision; it would not be fair for the United States government to do this after the fact (even though the rule had not been established when the USITC made its findings in *Lamb Meat*.) Also, in *United States - Wheat Gluten*, as in *Argentina - Footwear Safeguard*, exclusion of other members of a free trade area (“FTA”) or customs union (NAFTA, Mercosur, respectively) is at the Member’s peril. If the imports from the FTA member country are included in the injury determination, they cannot be excluded from the remedy. However, the Appellate Body sidesteps the issue of whether Article XXIV of GATT would in itself justify an exclusion of another member of the FTA or customs union from the safeguards.

*United States - Cotton Yarn Safeguards* arises under the Agreement on Textiles and Clothing (ATC) rather than the Safeguards Agreement, but the Appellate Body’s approach is the same. The careful, narrow, textual approach of the Appellate Body finds a serious flaw in the United States’ analysis: it was fatal error to exclude vertically integrated yarn producers from the definition of “domestic industry” in the analysis. Also, in an analogy to the Article XXIV problem, the Appellate Body decides that it was incorrect of the United States to apply the safeguard only to Pakistani yarn while excluding the yarn from the other major exporter (Mexico), even though the price of the Pakistani yarn was much lower.

As a whole, the 2001 cases leave competent authorities everywhere with an increasingly difficult, perhaps impossible, burden in satisfying the requirements for the imposition of safeguards.

## II. A WORD ON OMISSIONS: COMPLIANCE DETERMINATIONS

As is evident from the Table of Contents and Discussion below, we have covered eight major cases. Six of them involve trade remedies (three AD cases and three safeguard cases); one concerns balance of payments safeguards and related provisions of the GATT, and one deals with environmentally-based restrictions on trade. Any one of these cases is a hearty meal for an international trade lawyer to digest. The eight cases combined are a veritable feast. And yet, we must take care to note that there is some food on a nearby table that we have eyed but not taken. We have omitted from consideration in this *2001 WTO Case Review* the following Appellate Body Reports:

- *United States – Import Measures on Certain Products from the European Communities* (complaint by the European Communities, WT/DS165/1). The Dispute Settlement Body (“DSB”) adopted the Appellate Body report on 10 January 2001.
- *United States - Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia* (WT/DS58/AB/RW). The DSB adopted the Appellate Body Report on 21 November 2001.
- *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States: Recourse to Article 21.5 of the DSU by the United States* (WT/DS132/AB/RW). The DSB adopted the Appellate Body Report on November 21, 2001.

No adverse inference about the importance of these reports should be drawn from their omission. To the contrary, an argument can be made about the significance of the reports and each decision on compliance (sometimes we have discussed them with our colleagues and students). Rather, our decision to exclude the reports is based on the nature of these decisions, which relate back to earlier, underlying decisions on substantive points of law. Starting with this annual *WTO Case Review*, we have elected to omit from discussion Appellate Body reports on compliance. That is, the reports we are not covering concern fidelity—or the lack thereof—to recommendations the Appellate Body issued in a previous report. Our chief interest in the *WTO Case Reviews* is the earlier reports in which the substantive legal issues are joined by the parties and adjudicated by the Appellate Body.

Obviously, what happens thereafter—compliance or continued breach—is critical to any well-functioning international trade law regime. An Appellate Body (or Panel) Report about compliance matters not only to the parties to the case, but also raises the ongoing systemic problem of the uneasy relationship between Articles 21:5 and 22:2 and 6 of the DSU.<sup>10</sup> However, the Compliance Reports themselves obviously relate back to adjudicatory rulings in the underlying dispute. Those rulings on the

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10. The DSU is reprinted in RAJ BHALA, INT’L TRADE L. HANDBOOK 602 (2d ed. 2001) [hereinafter HANDBOOK].

substantive merits of claims and defenses yield some sort of precedent, they make some sort of contribution to the jurisprudence of the GATT and WTO. It is that contribution on which we want to focus. After all, that contribution is the “bottom line” principle in which every WTO Member is—or ought to be—interested, because it is the law of the case that the Member needs to know to stay out of trouble or to enforce a right.

Thus, for purposes of the *WTO Case Reviews*, we have chosen (albeit reluctantly) to exclude Appellate Body (and Panel) reports dealing solely with fights between parties about compliance. We are not so bold as to declare that our election is the right one, or for all time. And, we confess that part of the calculus underlying our election is constraints on our time and the consequent necessity to manage trade-offs.

We have chosen to trade compliance decisions for adopted Appellate Body Reports, and to focus on the substantive international trade law issues in those reports. Certainly, should the compliance decisions themselves begin to contribute materially to the emerging body of substantive international common law on trade, then we shall have to revisit our decision.

In the meantime, we point out that there is an easy way to track compliance adjudications, one to which we make frequent resort. The WTO’s excellent website ([www.wto.org](http://www.wto.org)) includes a document entitled *Update of WTO Dispute Settlement Cases*. The *Update* is revised and expanded periodically; Section VI deals with the implementation status of adopted reports. In that Section, the reader will find a chronological record of compliance with Panel and Appellate Body recommendations. That record is sufficiently detailed to allow the reader to see what the losing WTO Member in a case did, or did not do, that caused the winning Member to complain of a persistent violation. The discussion of compliance in the infamous *Bananas* case is a good example—it runs about four single-spaced pages.

In contrast, the discussion in Section V of the *Update*, concerning the underlying substantive disputes, is necessarily attenuated. It could not possibly provide more than a synopsis of relevant dates, parties, legal provisions, and judgments in a case; otherwise, it would be an unwieldy document—not an *Update*. (Indeed, the *Update* of February 6, 2002 already runs nearly 150 pages. We can only imagine its length after a few more years of DSU practice.) Consequently the reader is hard pressed to get more than a small taste of the merits of each case from that Section. She would need to go to the Appellate Body Reports—and/or our *WTO Case Review*—for a satisfying bite. We hope that, for most cases, it is “or.”

## PART TWO:

### DISCUSSION OF THE 2001 CASE LAW

#### I. GATT PROVISIONS

##### A. National Treatment, Agriculture, and the Korea Beef Case

###### *Citation:*

***Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*** (complaint by the United States, WT/DS161/1, and WT/DS169/1, complaint by Australia).

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 10 January 2001.

###### *Explanation:*<sup>11</sup>

###### 1. Korean Statutory Background

Like many countries, Korea is loath to expose certain agricultural sub-sectors to the vicissitudes of global free trade. One such sub-sector is beef, for which the Korean government has maintained a stabilization system for domestic producers.<sup>12</sup> The system is authorized by two Korean statutes. The first piece of legislation is the Act on Distribution and Price Stabilization of Agricultural and Fishery Products.

This act calls for the “smooth distribution of and maintenance of appropriate prices for agricultural and fishery products.”<sup>13</sup> The second statute, the Livestock Act, empowers Korea’s Ministry of Agriculture and Forestry (“MAF”) to establish a comprehensive plan for the livestock industry. The plan is supposed to deal with: (1) the improvement and production of livestock breeds, (2) structural development, (3)

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11. The discussion in sections (1) through (6) below is drawn from *Update of WTO Dispute Settlement Cases*, WT/DS/OV/4 pt. V.A.54 at 75-76 (Feb. 6, 2002), available at <http://www.wto.org.html> [hereinafter *Update*]; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R ¶¶1-5, 90, 143 (Dec. 11, 2001) [hereinafter *Korea Beef Appellate Body Report*]; Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R ¶¶ 8-29 (July 31, 2000) [hereinafter *Korea Beef Panel Report*]. Australia brought a complaint against Korea on the same basis as the United States, hence the two complaints are treated together. New Zealand and Canada participated as third parties.

12. Rice is another such sub-sector, and the bulk of Korean governmental support goes to domestic rice farmers.

13. *Korea Beef Panel Report*, *supra* note 11, ¶ 12.



balancing demand and supply forces, (4) stabilizing prices and enhancing the distribution system, and (5) the supply of livestock feed, and proper treatment and utilization of livestock excrement, as well as appropriate sanitation.

Quite obviously, the purposes of these two statutes cannot be achieved without paying attention to the importation, distribution, and sale of foreign-produced beef. Thus, Korea has regulated the introduction of foreign beef into its market. Indeed, Article 25 of the Livestock Act authorizes the MAF to regulate sales of imported beef when necessary for domestic consumer protection, the prevention of illegal distribution, or the control of imported livestock products. The MAF's regulations may—and, in fact, do—restrict the quantity, timing, price, and method of these sales. The regulations are called the *Management Guideline for Imported Beef*.

Perhaps if Korea were a tiny beef market, or if its stabilization program were not viewed by Korea's trading partners as having egregious ramifications, the *Management Guideline* would not have attracted much attention. In fact, however, Korea hardly was a small player in the global beef trade. By Korea's own admission, it was one of the world's largest beef-importing countries, with 153,000 tons of imported beef in 1999, compared to 240,000 tons of locally-produced beef.<sup>14</sup> Perhaps so, agreed the United States, but Korea's *Management Guideline* had the effect of excluding beef imports from approximately 90 percent of Korea's 50,000 retail beef outlets.<sup>15</sup> For American beef producers, Korea was the third most important market in the world.<sup>16</sup> The *Management Guideline* also raised the ire of Australia, New Zealand, and Canada. In the late 1990s, Australia and New Zealand reported shipping an annual average of 65,000 and 15,000 tons of beef, respectively, to Korea, and Canada (shipping an annual average of 4,735 tons, valued at \$20 million) said Korea was its third largest beef export market.<sup>17</sup> These trading partners saw their interests adversely affected by Korea's stabilization program and the *Management Guideline* that implemented it. The "beef," as the pun goes, existed for a major trade dispute that would not end until September 10, 2001, when Korea announced it had implemented the recommendations of the Appellate Body as adopted by the DSB.<sup>18</sup>

## 2. The GATT Article III:4 Issue

The essence of the American complaint was that the stabilization scheme operated by Korea discriminated against imported beef in violation of paragraph 4 of

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14. See Daniel Pruzin, *U.S., Australia Agree with South Korea on Deadline to Implement WTO Beef Ruling*, 18 Int'l Trade Rep. (BNA), at 661 (Apr. 26, 2001).

15. See *id.*

16. See Daniel Pruzin & Rossella Brevetti, *WTO Appellate Body Upholds Ruling Against Korean Beef Restrictions*, 17 Int'l Trade Rep. (BNA), at 1894, 1895 (Dec. 14, 2000).

17. See *Australia, Canada, and New Zealand Seek to Join WTO Talks on Korean Beef*, 16 Int'l Trade Rep. (BNA), at 307 (Feb. 24, 1999).

18. See *Update*, *supra* note 11, at 115-16.

GATT Article III.<sup>19</sup> This famous multilateral obligation states:

The products of the territory of any Member imported into the territory of any other Member shall be accorded *treatment no less favourable* than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.<sup>20</sup>

There were four factual predicates for the American allegation: retail sales regulations, display rules, importation channels, and other measures.

First, the Korean regulatory scheme confines sales of all imported beef (other than pre-packed beef) to specialized stores. That is, pursuant to the MAF's *Management Guideline*, Korea maintains a "dual retail system," whereby separate retail distribution channels exist for imported versus domestic beef products. Imported beef can be sold only in small-scale foreign beef shops, or in certain large-scale stores. That is, a small retailer—*i.e.*, a shop, like a corner grocery store, that is neither a supermarket nor a department store—has a choice regarding the beef it sells.

The small retailer can sell only Korean beef, or only foreign beef, but not both products. If it opts to sell foreign beef, then it is designated a "Specialized Imported Beef Store." As for large retailers—*i.e.*, a department store or supermarket—they may sell both imported and domestic beef, but only if so authorized. And, they must do so in different sales areas.

Second, as just suggested, Korea limits the way in which imported beef can be displayed. Most notably, an authorized large-scale retailer must effectively quarantine the foreign beef it sells. After all, queried the United States, that is the practical implication of an entirely separate sales area for imported beef. Similarly, a foreign beef shop has to display a sign that designates it a "Specialized Imported Beef Store." This "ancillary sign requirement" must distinguish clearly the foreign beef shop from a domestic meat seller.

Third, a variety of laws and regulations restrict the resale and distribution of imported beef. Specifically, beef could be imported through only two channels. The first channel is the Livestock Products Marketing Organization ("LPMO"). Established in 1988,<sup>21</sup> the LPMO is a wholesale state trading agency for beef. The Korean government granted the LPMO a monopoly over the importation and distribution of a share of Korea's total beef imports. Article 3 of the MAF's *Management Guideline* is bold about the goal of the LPMO: to import beef in order to stabilize demand and supply in the Korean market, and thereby "to protect both

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19. A wide range of types of imported beef were at issue, namely, fresh, chilled, and frozen bovine meat imports. See *Korea Beef Panel Report*, *supra* note 11, ¶ 8.

20. GATT art. III:4, *reprinted in* HANDBOOK, *supra* note 2, at 189 (emphasis added).

21. The LPMO's statutory authorization is found in Korea's *Livestock Act* art. 24, in addition to its *Foreign Trade Act* art. 53.

producers and consumers through the stabilization of demand—supply and price of livestock products.”<sup>22</sup>

The second channel is through so-called “super-groups” under a “Simultaneous Buy/Sell” (“SBS”) system. Each year, the MAF divides up the annual import quota between the LPMO and the SBS systems. The share imported by the LPMO has fallen over the years. Between 1988 and 1991, the LPMO imported 100 percent of Korea’s beef. By the time of the WTO action, the LPMO was importing about 30 percent of Korea’s aggregate beef quota. Nevertheless, the LPMO plays a large role in the beef imported through the SBS system. Under authority delegated from the MAF, the LPMO licenses imports made through the SBS system and allocates the quota share for the SBS system to specific SBS quota holders. The United States complained that resale and distribution are constrained via regulations governing the SBS system, as well as by rules applicable to retailers, customers, and end-users.

Why? That is, how did the SBS system operate? The *Korea Beef* Panel described it as “a system through which suppliers of beef imported into Korea carry out business directly with entities called ‘super-groups,’ end users, or customers.”<sup>23</sup> A super-group is “an organization . . . of end users which has [*sic*] the right to import beef under the SBS system and, as appropriate, allocate SBS sub-shares among its affiliated end users.”<sup>24</sup> At the time of the case, there were 12 super-groups: (1) National Livestock Cooperatives Federation (“NLCF”); (2) Korea Cold Storage Company; (3) Korea Tourist Supply Center; (4) Korea Restaurant Supply Center; (5) Korea Meat Industries Association; (6) Korea Super Chain Stores Association; (7) Korean Federation of Meat Purveyors; (8) Livestock Cooperative Trading and Marketing; (9) Korea Meat Packers Association; (10) Woo Joo Industrial Company Ltd; (11) Korea Imported Meat Distributors Association; and (12) Korea Meat Processing Industry Cooperatives. Each super-group is comprised of a number of end-users of imported beef. To import beef through the SBS system, an end-user must be a member of a super-group and may belong to only one super-group.

As suggested above, at the start of each fiscal year, the LPMO allocates to each SBS quota holder a specific share in the quota. Those quota holders are none other than the super-groups. Thus, the LPMO decides how much beef each super-group can import. In turn, each super-group establishes a quarterly purchase plan for every end-user that is a member of the super-group, and tells the LPMO of these plans. These plans contain a maximum amount each end user is allowed to import per quarter, and the amounts are based on forecast domestic demand. Then, the end-users negotiate directly with a beef exporter on the cut, price, delivery, and other terms of sale—but, of course, within the parameters established by the quarterly purchase

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22. *Korea Beef* Panel Report, *supra* note 11, ¶ 16.

23. *Id.* Readers familiar with the *Bananas* case no doubt will see an analogy in the level of complexity – and rampant protectionism that lies behind the complexity – of the import restrictions. For a discussion of that case, see Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839 (2000).

24. *Korea Beef* Panel Report, *supra* note 11, ¶ 21.

plans. Yet, the importation transactions may not proceed until the super-groups, on behalf of their end user members, obtain the approval from the LPMO of the terms of the transaction—including, of course, the price. If in any given quarter a super-group does not import the full amount that it was allocated, then it must make up for the shortfall in the next quarter by reallocating appropriate allotments among its end users.<sup>25</sup>

The fourth and final factual predicate for the American claim on national treatment concerned a variety of Korean measures dealing with importing and distribution. The United States said that these measures limit the opportunities for the sale in Korea of imported beef. One example of such a rule is labeling. Korea maintains labeling requirements on foreign beef imported through the SBS system that it did not impose on domestic beef. These requirements include a statement as to the end-consumer, the contract number, and the super-group importer—all of which had to be put on the imported beef but not on the like domestic product. Another example of a discriminatory rule, which the United States highlighted, concerns more stringent reporting and record-keeping requirements for purchasers of imported beef than for domestic beef under the SBS system (*i.e.*, for the super-groups and their end-user members). Still another example cited by the United States is Korea's prohibition on cross-trading of imported beef. Post-importation trading of imported beef among end-users in the SBS system is forbidden.

### 3. The GATT Article II:1 Issue

In addition, the United States alleged that Korea's regulatory scheme violated GATT Article II, specifically paragraph 1. This fundamental GATT obligation states:

- (a) Each contracting party shall accord to the commerce of the other contracting parties *treatment no less favourable* than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
- (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, *be exempt from ordinary customs duties in excess of those set forth and provided for therein*. Such products shall also be exempt from all other duties or charges

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25. If the super-group knows in advance that it will not import the full amount allocated to it, then it must report the expected shortfall to the LPMO. The LPMO will reallocate the shortfall in the next quarter among all the super groups in the same proportion as their initial allocations.

of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.<sup>26</sup>

The Article II:1 violation arose, argued the United States, because—until December 31, 1999—Korea imposed a mark-up on sales of imported beef, particularly beef from grass-fed cattle, as a result of the operation of its SBS system.

Indeed, the Korean government required a mark-up on all beef imported through this system, which was set forth in the *Management Guidelines*. The magnitude of the mark-up was the difference between the (1) duty-paid cost, insurance, and freight (“CIF”) price of beef and (2) weighted average wholesale price for all imported boneless grain-fed beef bought and distributed by the LPMO. In other words, the mark-up was designed to ensure beef imported through the SBS system and via the LPMO were priced the same. The mark-up was re-set both weekly and monthly and, overall, was substantial. It was one hundred percent in 1993, sixty percent in 1996, forty percent in 1997, twenty percent in 1998, and ten percent in 1999. The proceeds from the mark-up were deposited in a fund to help support the Korean livestock industry.

The United States pointed out that Korea had not set forth in its Schedule of Concessions (Schedule LX) the duties and charges that comprised the mark-up. To the contrary, in its Schedule, Korea made the following market access commitments for imported beef: (1) an increase from 123,000 tons in 1995 to 225,000 tons in 2000; (2) a reduction in the bound tariff from 44.5 percent to 40 percent in 2004; and (3) the elimination (or bringing into conformity with GATT obligations) of all remaining restrictions starting on January 1, 2001. Thus, the United States claimed that Korea treats imported beef from grass-fed cattle less favorably than provided for in the Schedule of Concessions agreed to by Korea.

#### 4. The GATT Article XI:1 Issue

The United States also alleged that Korea’s scheme violated paragraph 1 of GATT Article XI. This well-known rule against quantitative restrictions states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other

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26. GATT art. II:1(a)-(b), reprinted in HANDBOOK, *supra* note 10, at 186 (emphasis added).

contracting party.<sup>27</sup>

Here, then, was yet another violation of a pillar of the GATT. The violation of Article XI:1(a), in particular, arose out of the operation of the LPMO.

As just indicated, the Korean government granted the LPMO a partial monopoly over the importation and distribution of beef. The LPMO imports beef at world market prices through a tender system. In turn, on a daily basis, the LPMO sets a minimum acceptable wholesale auction price for each cut and brand of imported beef. The LPMO sells the beef it has imported only at or above this minimum price to wholesale buyers.

The minimum auction prices reflect a plan, set annually by the LPMO for purchases and distribution of imported beef, that takes into account current and forecast levels of domestic beef demand, supply, and pricing. After the auction is done, the LPMO-imported beef has to be sold from the wholesale market, controlled by the LPMO, to specialized imported beef stores. As indicated earlier, these stores have to display a special sign, which states "Specialized Imported Beef Store." Further, these stores must pay for the imported beef with cash. The United States examined this auction scheme and, to put it bluntly, found that the whole thing amounted to a rigged market.

Two other bases on which the United States claimed a violation of GATT Article XI:1 were quite specific. First, between November 1997 and May 1998, the LPMO behaved in such a way as to impose import restrictions on imported grass-fed beef. As intimated above, aside from its job of importing a portion of Korea's beef quota, the LPMO also is responsible for inviting tenders and selling the beef that it imports at auctions. Indeed, the LPMO arranges for importation of its share of Korea's quota through a tendering system. It then re-sells the beef it has imported via auction to wholesalers, or it transfers the beef directly to processors or the Korean military. The United States pointed out that, on some occasions, the LPMO failed to call for tenders, while on other occasions it delayed in issuing the call. When the LPMO made a call for tenders, it did so subject to a distinction between grass-fed cattle and grain-fed cattle. The LPMO also delayed in providing quota allocations. In other words, the LPMO's tendering and quota allocation processes were quantitative restrictions inconsistent with Article XI:1.

Second, the United States said that the LPMO's "discharge" practices also were problematic under this GATT provision. These practices concern the storage of imported beef and its discharge after sale at an auction. One of the SBS system super-groups, namely the NLCF, handles storage and discharge. It operates on behalf of the LPMO in performing these tasks. Accordingly, the NLCF has the discretion to decide the amounts of imported beef to be discharged from storage. It does so on a daily basis, taking into account prices of domestically-produced beef. Here again, urged the United States, was another unauthorized quantitative restriction in violation of GATT Article XI:1.

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27. GATT art. XI:1, *reprinted in* HANDBOOK, *supra* note 10, at 201.

Because these restrictions applied only to imported beef, and thus denied national treatment, the United States said they were a further grounds for finding a violation of GATT Article III:4. Moreover, the LPMO's tendering practices provided further grounds for finding a violation of GATT Article II:1(a). The distinction made by the LPMO's tendering calls between grass-fed and grain-fed beef resulted in less favorable treatment to grass-fed beef than was set forth in Korea's Schedule of Concessions. The United States also urged that the same facts constituting a violation of GATT Article XI:1(a) also violated Article 4:2 of the Uruguay Round Agreement on Agriculture.<sup>28</sup> Finally, the United States claimed that the limitations on sales of imports to the LPMO and super-groups contravened Articles 1 and 3 of the Uruguay Round Agreement on Import Licensing Procedures.<sup>29</sup>

### 5. The Agriculture Agreement Issues

As if all the above facts were not enough to show the incongruity between Korea's treatment of imported beef and its GATT-WTO obligations, the United States opened one other major line of legal attack. It concerned the Uruguay Round Agreement on Agriculture. The United States said the Korean government, in 1997 and 1998, had incorrectly calculated the amount of support it provided to its domestic beef farmers. Perhaps such an error might sound innocent, but in fact the United States said it had serious ramifications for compliance with the Agriculture Agreement.

The correct amount, *i.e.*, Korea's true Aggregate Measure of Support ("AMS") for beef, was higher than what Korea had stated. Article 1(a) of the Agriculture Agreement defines "AMS" as a measure of

the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product . . . which is . . . .

. . . .

- (ii) with respect to support provided during any year of the implementation period [*i.e.*, the six-year period commencing in the year 1995] and thereafter, *calculated in accordance with the provisions of Annex 3 of this Agreement*, and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's

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28. This *Agreement* is reprinted in HANDBOOK, *supra* note 10, at 305-32.

29. This *Agreement* is discussed briefly in RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS §§ 1-2(f)(2), 1-6(a)(3)(B) (1998).

Schedule. . . .<sup>30</sup>

The “Total” AMS is

the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, . . . which is . . . .

- . . . .
- (ii) with respect to the level of support actually provided during any year of the implementation period [where, again, the “implementation period” is the six-year period commencing in the year 1995] and thereafter (*i.e.*, the “Current Total AMS”), *calculated in accordance with the provisions of this Agreement*, including Article 6 [concerning permitted exclusions and *de minimis* levels], and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member’s Schedule . . . .<sup>31</sup>

In sum, “AMS” refers to support for a single agricultural product (that is, in one specific sub-sector), “Total AMS” refers to the support provided to all agricultural products (*i.e.*, all farming sectors taken together), and “Current Total AMS” refers to the Total AMS in any given year. The term “commitment level” refers to the promise made by a WTO Member regarding the Current Total AMS in a given year. That AMS is not to exceed the commitment level. Each WTO Member sets forth these promises—*i.e.*, lists its annual commitment levels—in its Schedule of Concessions.

What were the legal effects of the understatement by Korea of its AMS for beef? “Plenty,” was the essence of the American response. The United States said that because Korea’s true AMS for beef was higher than what Korea had reported, Korea exceeded the *de minimis* level set forth in Article 6 of the Agriculture Agreement. Article 6:4 sets a five percent *de minimis* level for developed country Members of the WTO, and a ten percent level for developing countries.

- (a) A Member shall not be required to include in the calculation of its Current Total AMS and shall not be required to reduce:
- (i) product-specific domestic support which would otherwise be required to be included in a Member’s

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30. *Agreement on Agriculture* art. 1(a), reprinted in HANDBOOK, *supra* note 10, at 306 (emphasis added).

31. *Agreement on Agriculture* art. 1(h), reprinted in HANDBOOK, *supra* note 10, at 307 (emphasis added).



calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year;

- ....
- (b) For developing country Members, the *de minimis* percentage under this paragraph shall be 10 per cent.<sup>32</sup>

Korea qualified as a developing country, so its relevant threshold was ten percent.<sup>33</sup> Thus, the United States was saying that during 1997 and 1998, Korea gave support to its domestic beef farmers, as measured by Current AMS for the beef sub-sector, which exceeded the ten percent *de minimis* threshold. Because it exceeded that threshold, Korea was supposed to include it in the calculation of the Current Total AMS. After all, Article 6:4(a) exempts from Current Total AMS only a *de minimis* amount of support to a particular sub-sector. Yet, Korea exceeded the *de minimis* amount and failed to include the support in Current Total AMS.

That was not the only ill effect of Korea's calculation error. There was, alleged the United States, a violation of Article 7:2(a) of the Agriculture Agreement. As just indicated, Korea did not include the true AMS amount for beef in its Total Current AMS. That exclusion was itself a violation of Article 7:2(a) of the Agriculture Agreement. This provision states:

Any domestic support measure in favour of agricultural producers, including any modification to such measure, and any measure that is subsequently introduced that cannot be shown to satisfy the criteria in Annex 2 to this Agreement or to be exempt from reduction by reason of any other provision of this Agreement shall be included in the Member's calculation of its Current Total AMS.<sup>34</sup>

Even this violation was not the end of the legal repercussions, urged the United States.

While Korea reported levels of Current Total AMS that were below its Total AMS commitments, in fact, Korea was under-reporting the level of total domestic support it had been giving to its farmers. That support actually exceeded its WTO commitments. In turn, Korea violated Article 3:2 of the Agriculture Agreement, said the United States. This provision says:

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32. *Agreement on Agriculture* art. 6:4(a), reprinted in HANDBOOK, *supra* note 10, at 311-12.

33. *See Korea Beef Appellate Body Report*, *supra* note 11, ¶ 110.

34. *Agreement on Agriculture* art. 7:2(a), reprinted in HANDBOOK, *supra* note 10, at 312.

Subject to the provisions of Article 6 [*i.e.*, permitted exclusions from the calculation of Current Total AMS, and the *de minimis* level], a Member *shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule*.<sup>35</sup>

The Article 3:2 violation arose, claimed the United States, because Korea's true Current Total AMS was higher than the amount it had set forth in Part IV, Section I of its Schedule of Concessions.

Given the intricacy of the issues arising under the Agriculture Agreement, it is worth dissecting the American claim into its constituent parts. There are five conceptual inquiries embedded in the American claim.

- First, what promises did Korea make about the amount of support it would provide to its agricultural sector (the beef sub-sector, plus all other sub-sectors)?

To answer this question, it was necessary to find the true AMS commitment levels. These commitment levels were important because they were the yardstick against which Korea's actual total support to its agricultural sector—its Current Total AMS—would be compared. Any excess of the Current Total AMS over the commitment level for the same year would constitute a violation of Article 3:2 of the Agriculture Agreement.

- Second, what level of support did Korea provide to its beef producers?

To answer this question, it was necessary to know what payments Korea actually had made to its beef producers.

- Third, was the level of support Korea gave to its beef sub-sector in excess of the ten percent *de minimis* threshold permitted under Article 6:4(b) of the Agriculture Agreement for developing countries?

The answer to this question depended on the answer to the second question.

- Fourth, if the actual support amount Korea gave to its beef sub-sector exceeded the *de minimis* threshold, then what was Korea's true Current Total AMS?

Korea had excluded support payments to its beef sub-sector from its Current Total AMS, on the presumption that beef support payments were *de minimis*

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35. *Agreement on Agriculture* art. 3:2, reprinted in HANDBOOK, *supra* note 10, at 307 (emphasis added).

and, therefore, did not have to be included as per Article 6:4(b). But, if they were not *de minimis*, then Current Total AMS had to be re-computed.

- Fifth, did Korea's Current Total AMS, properly calculated, exceed its commitment levels?

This question was the most crucial of all. It was the “bottom line” as to whether Korea had kept its promise to the WTO and all other Members. To answer it, two figures were indispensable: (1) the promise Korea had made, *i.e.*, its scheduled commitment level, and (2) its actual support payments to all agricultural sub-sectors, *i.e.*, its Current Total AMS. The answer entailed a straightforward comparison between the two figures. Any excess over a commitment level would be a violation of Article 3:2 of the Agriculture Agreement. Thus, not surprisingly, a great deal of the debate in the case, recounted below, concerned the two figures and their accuracy. After all, to put it bluntly, if Korea had kept its promise, then it could proclaim itself to be an honest, trustworthy trading partner. If it had not, then, at the very least, it had behaved like a fool for having exceeded its commitment levels. Or, worst yet, it had behaved like a knave by lying about its support to domestic beef producers.

It also is worth observing that these inquiries are not limited to the American claim in the *Korea Beef* dispute. They may be generalized to many other potential disputes. That is, they amount to an algorithm (with adjustments like use of a five percent *de minimis* threshold for a developed country) that any potential claimant would have to consider when formulating an argument about another WTO Member's domestic agricultural support payments in relation to that Member's Schedule of reduction commitments.

## 6. Panel Findings<sup>36</sup>

At the Panel stage, the United States fared well, and better than it would on appeal. The Panel agreed that Korea's regime for imported beef violated GATT Article III:4 in treating such beef less favorably than domestic beef. In particular, the Panel found that two aspects of the regime denied imported beef national treatment and violated GATT Article III:4: (1) the dual retail system for beef (including the requirement of a separate display for imported beef sold in authorized stores and supermarkets, and the requirement imposed on foreign beef stores of a sign saying

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36. This discussion is drawn from *Update, supra* note 11, at 75-76; *Korea Beef* Appellate Body Report, *supra* note 11, ¶¶ 5, 90-92, 94, 107-08, 130. Australia brought a complaint against Korea on the same basis as the United States, hence the two complaints are treated together. *See id.* ¶ 2.

“Specialized Imported Beef Store”) and (2) the limitation on the supply of imported beef from the LPMO’s wholesale market to specially-designated imported beef stores.

As the Appellate Body would later instruct in its Report, there are three elements in any GATT Article III:4 violation:<sup>37</sup>

- (1) The imported and domestic products are “like products.”
- (2) The trade measure in question is a “law, regulation, or requirement” that affects the “internal sale, offering for sale, purchase, transportation, distribution, or use” of the imported products.
- (3) The imported products are accorded “less favorable” treatment.

In the *Korea Beef* case, the first two elements were not in dispute. At both the Panel and Appellate Body stage, the American claim, and the Korean defense, focused on the third element.

The Panel offered two rationales to support its finding that Korea provided less favorable treatment to foreign than to domestic beef and thereby ran afoul of Article III:4. First, because Korea’s trade measures were premised solely on the country of origin of beef, they were incongruous with the national treatment obligation. The Panel went so far as to make this a general rule, holding that “[a]ny regulatory distinction that is based exclusively on criteria relating to the nationality or the origin of the products is incompatible with Article III.”<sup>38</sup>

Second, the dual retail system modified the conditions of competition between imported beef and the like Korean product. The Panel found several modifications of those conditions caused by the dual retail system:<sup>39</sup>

- *Difficulty of comparison shopping.* Korean consumers had limited chances to compare imported and domestic beef, hence the opportunities for imported beef to compete head-on with Korean beef were constrained. It is simply not convenient for Korean shoppers to examine the two products and make comparisons.
- *Display trade-off.* The only way imported beef can be displayed on store shelves in Korea is if the retailer agrees to substitute it for all existing like domestic products, *i.e.*, the retailer can sell either foreign beef or Korean beef, but not both. Given the small market share held by foreign beef, few retailers selling domestic beef would accept this trade-off.
- *Limited number of sales outlets.* Imported beef cannot be sold in the vast

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37. See *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 133.

38. *Id.* ¶ 138.

39. *Id.* ¶ 139.

majority of retail stores in Korea. Therefore, the potential market opportunities for imported beef are strictly limited. Because many Korean consumers purchase and consume beef on a nearly daily basis, they may be unwilling to shop around to find imported beef, whether for lack of time, convenience, or other reasons.

- *Adding costs.* Selling foreign beef imposes more costs on that product, because it must be sold in authorized or specialty shops. That is, domestic beef is sold from existing retail outlets, but foreign beef requires the establishment of new stores. The costs of establishment are transferred to buyers through higher prices for imported beef than for domestic beef.
- *Consumer perceptions.* Even though imported and Korean beef are like products, the perception that they are different is reinforced by the dual retail system. That perception amounts to a competitive advantage to domestic beef that is not based on quality or other meritocratic criteria relating to the products.
- *Sheltering high prices.* The distinct sales channels for imported and Korean beef make it far easier to maintain a price differential between these like products than if there were no dual retail system.

The Panel went on to reject Korea's defense, under GATT Article XX:(d), that the requirement was "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions" of GATT.<sup>40</sup>

These Article III:4 violations were serious enough, but they were not the only problems the Panel found. The Panel also said that Korea violated GATT Article III:4 by imposing more stringent record-keeping requirements on purchasers of foreign beef imported by the LPMO than on buyers of domestic beef. Likewise, it failed to live up to the national treatment obligation by imposing additional labeling requirements on foreign beef imported through the SBS system that did not obtain for domestic beef.

The Panel also agreed with the United States' claims under GATT Articles II:1 and XI:1. The less favorable treatment of imported beef from grass-fed cattle indeed violated Article II:1(a). And, the LPMO's tender practices violated GATT Article XI:1 as well as Article 4:2 of the Agriculture Agreement.

The Panel essentially agreed with the American claims under the Agriculture

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40. GATT art. XX:(d), reprinted in HANDBOOK, *supra* note 10, at 227. The Panel found that some of the contested Korean measures were excused by a Note in its Schedule of Concessions. Under Note 6(e), Korea was able to maintain the measures until January 1, 2001, and it had done so. Fortunately for Korea, however, by then it eliminated the measures benefiting from the Note. See *Korea Beef Appellate Body Report*, *supra* note 11, ¶ 5. These measures are not discussed herein.

Agreement. Specifically, the Panel said Koreans had incorrectly calculated the support it had given to its beef farmers. The Panel reworked the calculation based on a methodology that, presumably, it thought was permissible under Article 1(a)(ii) and Annex 3 of the Agriculture Agreement. The Panel observed that Korea had put forth two sets of figures in its Schedule (*i.e.*, Schedule LX, listing *inter alia* commitments under the Agriculture Agreement) in a column entitled “Annual and Final Bound Commitments Level 1995-2004.” One set of figures was not bracketed in any way, while the other set of figures was inside brackets. An excerpted version of this table is as follows:<sup>41</sup>

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41. The complete Table is set forth in *Korea Beef Appellate Body Report*, *supra* note 11, ¶ 94.

*Excerpt from*  
**Korea's Schedule LX**  
**Part IV, Section I**  
**Domestic Support: Total AMS Commitments**  
*(in billions of Korean won)*

<i>Year</i>	<i>Annual and Final Bound Commitments Level 1995-2004  Un-Bracketed Figures (Used by Panel)</i>	<i>Annual and Final Bound Commitments Level 1995-2004  Bracketed Figures (Used by Korea)</i>	<i>Notes</i>
1995	1695.74	-2182.55	* Note 1
1996	1672.9	-2105.6	
1997	1650.03	-2028.65	
1998	1627.17	-1951.7	
1999	1604.32	-1874.75	
2000	1581.46	-1797.8	
2001	1558.6	-1720.85	
2002	1535.74	-1643.9	
2003	1512.89	-1566.95	
2004	1490	-1490	

**\*Note 1:** Refer to Note 1 of Supporting Table 6 about the numbers in parentheses.

The Panel called the un-bracketed and bracketed figures "Column 1" and "Column

2,” respectively. The Panel viewed the figures Korea had not put in brackets to be Korea’s commitment levels. Thus, the Panel used the un-bracketed figures to recompute Korea’s Total AMS to the beef sub-sector and its Current Total AMS. In particular, the Panel said Korea’s Total AMS commitment for 1997 was 1,650.03 billion won, and its 1998 level was 1,627.17 billion won.

Significantly, however, the Panel ignored Note 1 in the above table. Thus, the Panel did not follow the reference to Note 1 of Supporting Table 6. That reference stated:

The AMS for rice has been calculated based on 1993 market price support instead of 1989-1991 average. The Final Bound Commitment level in 2004, however, is the level reduced by 13.3% from the 1989-1991 average Base Total AMS.<sup>42</sup>

What did this Note mean? And, what difference did the Panel’s failure to examine this Note make? These were questions the Appellate Body would have to take up in its Report, and they are discussed below.<sup>43</sup>

For now, the point on which to focus is that, based on its recalculation, the Panel held that Korea violated three provisions of the Agriculture Agreement:

- First, domestic support to beef producers exceeded the *de minimis* level allowed under Article 6 of the Agriculture Agreement. Accordingly, the Panel said that Korea ought to have included that support in its Current Total AMS.
- Second, because that support—the current AMS for beef—was not included in Korea’s Total Current AMS, Korea violated Article 7:2(a) of the Agriculture Agreement.
- Third, Korea ran afoul of Article 3:2 of the Agriculture Agreement, because Korea’s total domestic support (*i.e.*, its current Total AMS, correctly calculated) for 1997 and 1998 exceeded the level to which Korea had committed itself in Section 1, Part IV of its Schedule.

These conclusions were arithmetically determined—predictable, as it were. The Panel chose the un-bracketed figures as representing Korea’s commitment levels, and the un-bracketed numbers were lower than the bracketed figures. Using the un-bracketed figures, the Panel then compared the support Korea actually had provided to its beef farmers, and to its overall agricultural sector, against lower commitment levels for Total AMS that Korea had used.

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42. *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 99.

43. *See infra* note 62 and accompanying text.



### 7. The Appellate Body on GATT Article III:4<sup>44</sup>

Korea unsuccessfully appealed the Panel's finding that it had violated GATT Article III:4. Korea's appeal focused on the dual retail system, whereby imported beef must be sold in specialized stores. Korea argued that this requirement did not run afoul of Article III:4. Korea asked, where was the *prima facie* inconsistency? There was "perfect regulatory symmetry" in the separation of imported beef and Korean beef at the retail level, and there was "no regulatory barrier" barring a vendor from converting one type of retail store to the other type.<sup>45</sup> And, inquired Korea, where was the *de facto* discrimination? Surely, the Panel was wrong in finding any. Was not the Panel speculating, rather than relying on a careful analysis of the facts, about the conditions of competition? Simply to read Korea's argument was to appreciate why the argument was vulnerable and to anticipate how the Appellate Body likely would react to it.

In other words, the Korean argument on appeal was sufficiently weak that it is not clear why Korea bothered, other than to placate domestic constituency pressures or certain hard-line government bureaucrats. Predictably, the Appellate Body had little difficulty finding that the Panel was correct in holding that Korea's dual retail system for beef was inconsistent with GATT Article III:4.<sup>46</sup> It also agreed with the Panel's rejection of Korea's Article XX:(d) defense of this system.<sup>47</sup> Given these conclusions and under the principle of judicial economy, the Appellate Body found it unnecessary to decide the separate matter of whether Korea's ancillary labeling requirement was consistent with Article III:4 or justified under Article XX:(d).<sup>48</sup>

And yet, the Korean argument was not ridiculous from a legal perspective. As discussed earlier, the Panel had set forth two rationales to justify its finding that Korea violated GATT Article III:4, namely: (1) Korea's dual retail system was based solely on the origin of beef, and (2) this system modified the conditions of competition as between foreign and domestic beef. The Panel articulated the first rationale into a general legal principle—that any trade measure grounded exclusively on the origin of products was a violation of Article III:4. Might that be going a bit too far? As to some of the supposedly modified conditions of competition, was the Panel perhaps a bit hasty in its judgment?

The Appellate Body responded to both questions in the affirmative. While agreeing that Korea's dual retail system did lead to less favorable treatment for imported beef, in violation of Article III:4, the Appellate Body found that the Panel's first rationale was not the reason. The better basis for the conclusion was the second

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44. This discussion is based on *Korea Beef* Appellate Body Report, *supra* note 11, ¶¶ 75, 131-85.

45. *Id.* ¶ 130.

46. *See id.* ¶ 186(e).

47. *See id.* ¶ 186(f).

48. *See id.* ¶¶ 150-51, 186(g).

rationale, even though it too had a few problems. Thus, the Appellate Body essentially struck down the Panel's broad interpretation of Article III:4 and reexamined the competitive playing field for beef in Korea.

The problem with the Panel's first rationale was that it was inconsistent with the case law interpreting the critical phrase in GATT Article III:4. The Appellate Body's clear and cogent analysis is worth quoting at length:

134. The Panel began its analysis of the phrase "treatment no less favourable" by reviewing past GATT and WTO cases. It found that "treatment no less favourable" under Article III:4 requires that a Member accord to imported products "effective equality of opportunities" with like domestic products in respect of the application of laws, regulations and requirements . . . .

. . . .

135. The Panel stated that "any regulatory distinction that is based exclusively on criteria relating to the nationality or origin" of products is incompatible with Article III:4. We observe, however, that Article III:4 requires only that a measure accord treatment to imported products that is "no less favourable" than that accorded to like domestic products. A measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is "no less favourable." According "treatment no less favourable" means, as we have previously said, according *conditions of competition* no less favourable to the imported product than to the like domestic product. In *Japan – Taxes on Alcoholic Beverages*, we described the legal standard in Article III as follows:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production.'" Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions* for imported products in relation to domestic products. "[T]he intention of the drafters of the Agreement [*i.e.*, the GATT] was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given."

(Emphasis added by Appellate Body, citation omitted but discussed below<sup>49</sup>).

136. This interpretation, which focuses on the *conditions of competition* between imported and domestic like products, implies that a measure according formally *different* treatment to imported products does not *per se*, that is, necessarily, violate Article III:4. In *United States – Section 337*, this point was persuasively made. In that case, the panel had to determine whether United States patent enforcement measures, which were formally different for imported and for domestic products, violated Article III:4. That panel said:

On the one hand, contracting parties may apply to imported products *different* formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognized that there may be cases where the application of formally *identical* legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. (Emphasis added by Appellate Body, citation omitted).

137. A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated “less favourably” than like domestic products should be assessed instead by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.<sup>50</sup>

In sum, the Appellate Body was saying that the Panel had ignored the precedents in *Japan – Taxes on Alcoholic Beverages* and *United States – Section 337*.<sup>51</sup> Those

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49. See *infra* note 77 and accompanying text.

50. *Korea Beef* Appellate Body Report, *supra* note 11, ¶¶ 134-137 (emphasis added).

51. See generally RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE ch. 8

precedents teach that a trade measure based solely on the nationality of a product does not render the measure inconsistent with GATT Article III:4. “Treatment no less favorable” depends on substantive reality, namely the conditions of competition between foreign and domestic like products, not on formalistic distinctions based on country of origin.

Having tossed out the Panel’s first rationale as to why Korea’s dual retail system violated GATT Article III:4, the Appellate Body turned to its second justification—the modified conditions of competition. For the most part, the Appellate Body agreed with the Panel’s analysis. However, it noticed a few rough edges that needed to be trimmed back. For example, suppose it was true that the dual retail system made it impossible for Korean consumers to engage in a side-by-side, visual comparison of foreign and domestic beef, and that the system encouraged the perception that domestic beef was the superior product. These phenomena could be incidental effects of the dual retail system, and one cannot infer with confidence that they created a competitive disadvantage for foreign beef in violation of Article III:4. Even the formal separation between selling domestic beef and imported beef did not, in and of itself, mandate the conclusion that Korea treated the latter product less favorably than the former product. The conditions of competition themselves were what mattered.<sup>52</sup>

What was it about those conditions the Appellate Body found objectionable? As it explained in a “before versus after” comparison, it was the limited commercial opportunities for selling imported beef through small shops, once Korea had implemented the dual retail system:

When beef was first imported into Korea in 1988, the new product simply entered into the pre-existing distribution system that had been handling domestic beef. *The beef retail system was a unitary one, and the conditions of competition affecting the sale of beef were the same for both the domestic and the imported product.* In 1990, Korea promulgated its dual retail system for beef. Accordingly, the existing small retailers had to choose between, on the one hand, continuing to sell domestic beef and renouncing the sale of imported beef or, on the other hand, ceasing to sell domestic beef in order to be allowed to sell the imported product. Apparently, *the vast majority of the small meat retailers chose the first option. The result was the virtual exclusion of imported beef from the retail distribution channels through which domestic beef (and until then, imported beef, too) was distributed to Korean households and other consumers throughout the country.* Accordingly, *a new and separate retail system had to be established and gradually built from the ground up for bringing*

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(2d ed. 2001) (discussing the national treatment obligation and containing an excerpt from the *Japan – Taxes on Alcoholic Beverages Report*).

52. See *Korea Beef Appellate Body Report*, *supra* note 11, ¶ 144.

*the imported product to the same households and other consumers if the imported product was to compete at all with the domestic product.* Put in slightly different terms, the putting into legal effect of the dual retail system for beef meant, in direct practical effect, so far as imported beef was concerned, the *sudden cutting off of access to the normal, that is, the previously existing, distribution outlets* through which the domestic product continued to flow to consumers in the urban centers and countryside that make up the Korean national territory. The central consequence of the dual retail system can only be reasonably construed, in our view, as *the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef.* In 1998, when this case began, eight years after the dual retail system was first prescribed, the consequent reduction of commercial opportunity was reflected in the *much smaller number of specialized imported beef shops (approximately 5,000 shops) as compared with the number of retailers (approximately 45,000 shops) selling domestic beef.*<sup>53</sup>

Interestingly, the Appellate Body anticipated and rebutted an objection to its reasoning. Could it be said that Korea's dual retail system was not really a law, regulation, or requirement under GATT Article III:4, on the ground that it did not compel domestic retailers to sell Korean beef? In other words, the Korean measure compelled small retailers to make a choice between selling imported or domestic beef, but it did not dictate their choice. They were free to choose. Did this element of private decision-making mean that the government was exonerated from responsibility as to the conditions of competition? "Absolutely not," thundered the Appellate Body. "[T]he intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product."<sup>54</sup> In brief, the legal necessity of making the choice in the first place resulted from governmental action. To be sure, a dual retail system designed entirely by private entrepreneurs on the basis of their own cost-benefit calculations would not raise an Article III:4 question, because (by hypothesis) that scheme would not involve government intervention. But, as the Appellate Body made clear, those were not the facts in the case at bar.<sup>55</sup>

What did the Appellate Body make of Korea's defense under GATT Article XX:(d)? Korea argued that the dual retail system was "necessary to secure compliance" with its Unfair Competition Act. This act, which Korea said (and the

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53. *Id.* ¶ 145 (emphasis added).

54. *Id.* ¶ 146.

55. *Id.* ¶ 149.

Panel agreed) is consistent with GATT-WTO rules, was designed to avoid fraudulent misrepresentations to Korean consumers, such as the passing of one product for another. The Appellate Body found the defense as unpersuasive as had the Panel.

The Appellate Body began by applauding the Panel for its adherence to the Appellate Body's own *de facto* precedent, namely, *United States – Standards for Reformulated and Conventional Gasoline*. In that case, the Appellate Body held that an Article XX defense must be analyzed in two steps. First, one asks whether the specific requirements of the itemized Article XX exception (here, paragraph (d)) being invoked by the respondent are satisfied. Assuming those requirements are satisfied, then, as the next step of the analysis, one asks whether the general requirements in the *chapeau* to Article XX have been complied with. The Appellate Body was pleased that the Panel “followed the appropriate sequence of steps outlined” in *Reformulated Gas*.<sup>56</sup>

In *Korea Beef*, the respondent never made it past the first step. The Panel “correctly considered that it did not need to proceed to the second-tier analysis. . . .”<sup>57</sup>

In other words, the Appellate Body agreed with the Panel's conclusion that the dual retail system could not be justified under Article XX:(d). To be sure, the system was designed to “secure compliance” with the Unfair Competition Act, but that was only one of the two prongs in the language of paragraph (d). The system had to be “necessary” to secure that compliance. Like the Panel, the Appellate Body found that the system simply was not necessary because there were alternative measures that were reasonably available for Korea to use that did not violate the national treatment obligation.

Not surprisingly, the Appellate Body paid due homage to Article 31(1) of the Vienna Convention on the Law of Treaties,<sup>58</sup> invoked familiar lexicographic sources for the meaning of “necessary,” engaged in a protracted discussion of the meaning, and decided it meant something very nearly “indispensable.”<sup>59</sup> The Appellate Body also said that the meaning was informed by prior adjudication, namely, *United States – Section 337*, and it appeared delighted that the Panel had understood the relevance of that decision.<sup>60</sup> In that case, the GATT panel characterized a measure as unnecessary if there was an alternative rule that it was reasonable to expect the respondent to use and that was not inconsistent with any GATT obligation. The Appellate Body admitted candidly that applying the “necessity” test to nearly any set of facts involved a weighing and balancing of factors (not unlike, it might have added, a common law court).<sup>61</sup> The factors included the contribution of the measure to enforcement of the law in question, the importance of the values protected by that

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56. *Id.* ¶ 156. See BHALA, *supra* note 51, at 1614-30 (discussing *Reformulated Gas*).

57. *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 156.

58. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

59. See *Korea Beef* Appellate Body Report, *supra* note 11, ¶¶ 160-63.

60. See *id.* ¶¶ 165-67.

61. *Id.* ¶ 164.

law, and the impact of that law on imports.

The end result of that judicial balancing was an Appellate Body holding that the dual retail system is a disproportionate measure unnecessary for compliance with the *Unfair Competition Act*. Korea has no dual retail system in related product areas other than the sale of foreign beef, which suggests that the system is not necessary to prevent deceptive practices. Rather, for other products, like domestic beef, dairy cattle, pork, and seafood, Korea relies on normal policing methods, such as record-keeping, investigations, prosecutions, and fines. It could have done so with foreign beef also.

#### 8. The Appellate Body on Articles 3:2, 6:4, and 7:2(a) of the Agriculture Agreement<sup>62</sup>

The United States did not fare as well at the Appellate Body stage as it did at the Panel stage with respect to its claims under the Agriculture Agreement. That is, Korea had some success in its appeal of the Panel's holdings on Articles 3:2, 6:4, and 7:2(a) of the Agriculture Agreement. Korea argued that the Panel was wrong to conclude that Korea had exceeded its Current Total AMS commitment levels for 1997 and 1998. Why? Essentially, said Korea, because the Panel had made two mistakes.

First, Korea faulted the Panel for believing that the figures not in brackets in Schedule LX under the column "Annual and Final Bound Commitments Level 1995-2004" were Korea's commitment levels. The opposite was true. The figures within the brackets were the commitment levels. All the Panel had to do was look at Note 1 in the table (excerpted above), and thus to Note 1 to Supporting Table 6 in Korea's Schedule, and it would have seen the truth.

Second, Korea argued that the Panel was wrong to hold that the Current AMS for beef must be included in Current Total AMS. Korea cited to Annex 3 of the Agriculture Agreement, which it said the Panel had misread. In Korea's view, the Panel was supposed to rely on the "constituent data and methodology" that Korea had set forth in its Schedule, as Articles 1(a)(ii) and 1(h)(ii) of the Agriculture Agreement indicate.<sup>63</sup> Korea said that using the constituent data and methodology, it had calculated its Current AMS for beef properly, and that this amount was less than the ten percent *de minimis* level established in Article 6:4(b) of the Agriculture Agreement. Therefore, Korea argued, there was no need for it to include the Current AMS for beef in the Current Total AMS, and it had not exceeded its commitment levels in Part IV, Section I, of its Schedule.

The issues, then, for the Appellate Body to decide were clear. First, was the Panel wrong in concluding that Korea had violated Article 7:2(a) of the Agriculture Agreement by failing to include Current AMS for beef in Current Total AMS?

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62. This discussion is based on *id.* ¶¶ 75, 92-129.

63. See *supra* notes 30-31 and accompanying text (quoting these provisions).

Second, was the Panel wrong to hold that Korea violated Article 3:2 of the Agriculture Agreement on the ground that Korea's Current Total AMS had exceeded its commitment levels in its Schedule? Resolving both issues depended on the correct calculation of Current AMS for beef, and whether the support Korea had given to that sub-sector in 1997 and 1998 exceeded the ten percent *de minimis* threshold under Article 6:4(b) of the Agriculture Agreement. In turn, the correct calculation of Current AMS for beef hinged on identifying the correct figures for Korea's domestic support levels. Which figures were right, the bracketed or un-bracketed ones?

In brief, the Appellate Body agreed with the Panel that Korea erred in its calculation of the support it gave to domestic beef producers (the Current AMS for beef) in 1997 and 1998, namely, that the computation had not followed Article 1(a)(ii) and Annex 3 of the Agriculture Agreement.<sup>64</sup> But, ironically, the Appellate Body found that the Panel's methodology for recalculating the amounts of Korea's support to its beef farmers in 1997 and 1998 did not comply with the requirements of Article 1(a)(ii) and Annex 3 of the Agriculture Agreement.<sup>65</sup> Because the Panel's conclusions on Articles 3:2, 6, and 7:2(a) of the Agriculture Agreement were based on the Panel, itself, erring in the AMS calculation, the Appellate Body had no choice but to reverse these conclusions.<sup>66</sup>

What had the Panel done wrong, in the opinion of the Appellate Body? As Korea had argued, the Panel ignored Note 1 to the Table and thus did not track the reference therefrom to Note 1 in Supporting Table 6. This neglectful reading violated a *de facto* precedent the Appellate Body had set in 1998 in *European Communities – Customs Classification of Certain Computer Equipment*.<sup>67</sup> In that case, the Appellate Body made clear that the Schedule of Concessions of a WTO Member is an integral part of the GATT 1994 and must be read in accordance with the rules of the Vienna Convention on the Law of Treaties.<sup>68</sup> Applying Article 31:1 of the Vienna Convention, the Appellate Body emphasized the ordinary meanings of terms in a Schedule, in accordance with the context of those terms and the object and purpose of the overall treaty structure pursuant to which the Schedule was created. In the *Korea Beef* case, the Panel could not possibly have examined the ordinary meaning of Korea's Schedule, because it did not take into account all of the terms in that Schedule. The Panel ignored Note 1, and therein was the Panel's error.

A cursory reading of Note 1 of Supporting Table 6 (quoted above<sup>69</sup>) would suggest that it has nothing to do with domestic support measures for Korean beef farmers. After all, it concerns support for rice. However, the Appellate Body

64. See *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 186(b).

65. See *id.* ¶ 186(c).

66. See *id.*

67. See Report of the Appellate Body, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R at ¶ 84 (adopted 22 June 1998), cited in *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 96. See also BHALA, *supra* note 51, at 308-16 (excerpting the *Customs Classification* case).

68. Vienna Convention, *supra* note 58.

69. See *supra* note 42 and accompanying text.



stressed its ordinary meaning. The first sentence says that Korea's AMS calculations for rice are based on 1993 figures, but its AMS figures for all other products are based on average amounts derived from 1989-1991 data. The second sentence says that Korea calculated its final bound commitment level in 2004 by cutting by 13.3 percent the 1989-91 average base Total AMS. "So what?," asked the Appellate Body.

The clue to seeing why Note 1 was important was the word "however," that contrasted the first and second sentences. Korea had calculated its starting AMS commitment level for 1995 by using AMS calculations that relied on the base period of 1989-91 for all products except rice and the base year of 1993 for rice. But, for its final target commitment level for 2004, Korea used a base Total AMS figure derived from the base years 1989-91 for all products, including rice. So, as the table above indicates, the starting AMS commitment level figure for 1995 was 2,182.55 billion won, and Korea agreed to reduce this level by equal annual amounts through 2004, to reach a final target commitment level in 2004 of 1,490 billion won. Korea calculated these reduced commitment levels for each year through 2004 in the manner described in Note 1 of Supporting Table 6. That method entailed using the figures in the brackets, not the un-bracketed figures.

In other words, said the Appellate Body, when the plain meaning of Korea's table in its Schedule, including the notational references, are understood, it is apparent that Korea's AMS commitment levels are represented by the figures in brackets. The Panel was wrong to hold otherwise. The figures in brackets (what the Panel had called "Column 2") corresponded to Korea's real annual AMS commitment levels. Those levels used 1989-91 as the base period for all products except rice and 1993 as the base year for rice. Reduction commitments, then, followed from these bases. The figures not in brackets (what the Panel had dubbed "Column 1") were annual commitments for AMS, but using the base period of 1989-91 for all products. Korea had stated unequivocally, at meetings in the WTO's Committee on Agriculture, and in annual Notifications to that Committee, that the figures in brackets were the relevant ones in terms of ascertaining actual annual AMS commitments. In sum, the Appellate Body sided with Korea, and accepted as its 1997 and 1998 AMS commitment levels 2,028.65 and 1,951.70 billion won, respectively.<sup>70</sup>

Given that decision, was it easy for the Appellate Body to determine whether Korea's 1997 and 1998 Current Total AMS had exceeded its commitment levels? Hardly. Korea said that its Current Total AMS for those years, respectively, were 1,936.95 and 1,562.77 billion won. If true, then no doubt Korea had not exceeded its AMS commitments. But, had Korea calculated its Current Total AMS correctly? No, argued the United States, because it did not include the Current AMS for beef in its Current Total AMS. When the domestic support for beef is included in Current Total AMS, then the AMS commitment levels are exceeded. As explained earlier, the Panel agreed with the American argument: Korea's Current AMS for beef exceeded the *de minimis* level of ten percent in Article 6:4(b) of the Agriculture Agreement, so

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70. See *Korea Beef* Appellate Body Report, *supra* note 11, ¶¶ 103-04.

Korea should have included that support in its Current Total AMS in compliance with Article 7:2(a) of the Agriculture Agreement. When that support was included, it became evident that the commitment levels were exceeded, contrary to Article 3:2 of the Agriculture Agreement.

The Appellate Body carefully retraced the Panel's recalculation of the Current AMS for beef, the Current Total AMS, and the comparisons to Korea's commitment levels. It also scrutinized the methodology Korea advocated. In the end, the Appellate Body said there was insufficient information in the factual record to compute an accurate amount for Current AMS for beef. Therefore, it was impossible to say whether Korea's support to the beef sub-sector exceeded the ten percent *de minimis* threshold set by Article 6:4(b) of the Agriculture Agreement. In turn, it was impossible to know whether, under Article 7:2 of the Agriculture Agreement, the Current Total AMS Korea had provided was accurate, in its exclusion of the Current AMS for beef. And, because it was impossible to reach an accurate Current Total AMS, there was no way to tell whether Korea had exceeded its commitment levels in its Schedule, in violation of Article 3:2.

### ***Commentary:***

#### **1. Not the First Case of Its Kind**

Interestingly, the *Korea Beef* dispute was not the first one brought against Korea for its restrictions on imported beef. In 1989, a GATT panel issued a report in an action filed by the United States, Australia, and New Zealand.<sup>71</sup> In the 1989 case, the GATT Panel did not rule on the claim that Korea's quantitative measures violated GATT Article II:1(b), *i.e.*, that Korea's import monopoly—the LPMO—effectively imposed a tariff surcharge, which could not be characterized properly as a mere quota rent, and which caused the total tariff to exceed Korea's bound commitment. However, the Panel recommended Korea to eliminate its quantitative restrictions on imported beef, which did violate GATT Article XI:1 (an argument made by the United States and not disputed by Korea), and which raised concerns under GATT Article II:4. This provision prohibits an entity with a monopoly on the importation of a product from operating in a way to afford protection to a domestic producer in excess, on average, of the amount of protection provided for in the relevant Schedule of Concessions.<sup>72</sup>

After the GATT Panel Report, Korea entered into bilateral agreements—called “Records of Understanding”—between 1990 and 1993 with the United States,

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71. Report of the GATT Panel, *Republic of Korea – Restrictions on Imports of Beef, Complaint by the United States*, Nov. 7, 1989, 1989 WL 587597; *Korea Beef* Panel Report, *supra* note 11, ¶¶ 10-11, 28. See also BHALA, *supra* note 51, at 325-30 (excerpting the earlier case).

72. See GATT art. II:4, reprinted in HANDBOOK, *supra* note 10, at 187.

Australia, and New Zealand, to resolve the disputed issues surrounding the quantitative restrictions. Essentially, these agreements progressively raised base quota thresholds, established a Simultaneous Buy/Sell System to allow for part of the imported quota to be entered by buyers other than the Livestock Products Marketing Organization, and reaffirmed Korea's commitment to the eventual elimination of import restrictions.

More generally, the GATT Panel urged Korea to work out a timetable for the dissolution of all of its import restrictions on beef. Korea had defended the restrictions since 1967 on balance-of-payments ("BOP") grounds under GATT Article XVIII:B (*i.e.*, it contended that Article XVIII:B excused the Article XI:1 violation). However, the Panel did not agree that Korea had imposed the restrictions for BOP purposes. In effect, the United States had lost some of the battles in the 1989 case, but won the war against Korea's ostensibly BOP-based restrictions against imported beef. Or, so the United States might have thought.

The fact that the United States had to bring another major action against Korea is, at the very least, a testament to the recalcitrance of Korea, and indeed many countries, to open domestic agricultural markets to foreign competition. That recalcitrance bespeaks the power of certain domestic farming constituencies. In turn, in some countries, that power is based on antediluvian or at least controversial, constitutional and political laws that *prima facie* would seem to have nothing to do with trade. Only structural changes in rules governing matters like electoral district apportionments, constituency borders, and campaign financing are likely to weaken the grip of the domestic farming constituencies on the formulation of trade law and policy. Of course, lest Korea be singled out unfairly, it is worth recalling that America's own zest for agricultural trade reform is being tested now in the built-in talks under Article 20 of the Agriculture Agreement.<sup>73</sup> It will be put to an even tougher examination when the "peace clause" of Article 13 of the Agriculture Agreement expires on December 31, 2003.<sup>74</sup>

## 2. Footnotes, Precedent, and the International Rule of Law

The Appellate Body's analysis (quoted above<sup>75</sup>) of the GATT Article III:4 issue in *Korea Beef* is an excellent example of its reliance on precedent. It refers explicitly to previous decisions interpreting the "treatment no less favorable" language in that provision as "case law."<sup>76</sup> The Appellate Body proceeds to review the Panel's

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73. See generally Kevin C. Kennedy, *Reforming Farm Trade in the Next Round of WTO Multilateral Trade Negotiations*, 35 J. WORLD TRADE 1061-79 (2001) (discussion of the negotiations and what might lie ahead).

74. See *Agreement on Agriculture* art. 1(f), reprinted in HANDBOOK, *supra* note 10, at 306 (setting forth a nine-year period, commencing in 1995, for purposes of Article 13).

75. See *supra* note 50 and accompanying text.

76. See *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 134 (stating that "[t]he

analysis of that case law, and then to engage in its own analysis. The substantive result of all this work is a reversal – the Appellate Body found that the Panel had “gotten it wrong.”

The jurisprudential result is no less consequential, perhaps more so, than this holding. Why would the Appellate Body care to spend nearly three pages (paragraphs 133-138) on the correct legal interpretation of “treatment no less favourable” if it were nothing more than akin to an arbitral body? To read these pages is to see common law judges, at the international level, in action. Indeed, why else would the Appellate Body take such pains in citing the body of case law that backed each sentence of the legal standard it had set in *Japan – Alcoholic Beverages* and was applying in *Korea Beef*? The relevant footnote states:

Appellate Body Report [*Japan – Taxes on Alcoholic Beverages*], WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 pp. 16-17. The original passage [in that Appellate Body Report] contains footnotes. The second sentence is footnoted to *United States – Section 337 of the Tariff Act of 1930* (“*United States – Section 337*”), BISD 36S/345, para. 5.10. The third sentence is footnoted to *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, para. 5.1.9; and *Japan – Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, BISD 34S/83, para. 5.5(b). The fifth sentence is footnoted to *Italian Discrimination Against Imported Agricultural Machinery*, BISD 7S/60, para. 11.<sup>77</sup>

This kind of footnote could be written only by Appellate Body members who realize they do not practice in a world of one-shot appeals from initial arbitration decisions. Surely it bespeaks their perception of the legal world in which they operate, one typified by existing, evolving, and emerging precedents. No doubt an increasing number of trade lawyers appreciate what actually is occurring, though when that reality is put in explicit Anglo-American legal terms, with words like “judge,” “court,” “precedent,” “*stare decisis*,” and “common law,” some of them resist the characterization.<sup>78</sup>

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Panel concluded its review of the *case law* by stating....” (emphasis added)). See also *id.* ¶ 171 n.114 (referring to “GATT case law” with respect to comparisons among enforcement measures in different jurisdictions made pursuant to GATT Article XX:(d)).

77. *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 135 n.69. See *supra* note 50 and accompanying text.

78. See Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845-956 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLA. ST. U. J. TRANSNAT’L L. & POL’Y 1-151 (1999); Raj Bhala, *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEO. WASH. INT’L L. REV. 873-978 (2001) (all discussing issues of stare decisis in WTO adjudication).

That motivation for resistance is unfortunate. It is not the country of origin of the jurisprudential concepts that ought to matter. Reliance in a dispositive way on well-reasoned decisions from the past is not evidence of calculated Anglo-American legal imperialism, any more than the military campaign in Afghanistan is evidence of a renewed crusade by western powers against the Islamic world. If the doctrine of *stare decisis* is one day discovered to have emerged in the Middle Kingdom Period of Ancient Egypt, then so be it. (Arguably, such a discovery would render the doctrine even more august than it is now in the minds of some common law lawyers.) What ought to matter today—all the more so after September 11, 2001—is the development of the international rule of law and the contribution that rules of trade can make to peace and stability.

Footnotes can be irritating (even to lawyers). But, like the one just quoted, they also can be central to advancing the rule of law. A footnote can display to the parties, and to the world, that a holding is grounded on reason and experience that are honored by past adjudicators. In the *Korea Beef* case, the Appellate Body members display on paper a sincere concern for the accuracy, and the consistency over time, of the meaning of one of the most fundamental obligations in all of GATT-WTO law, namely, national treatment. Their care is well placed. Without this appeals court to correct an errant panel from wrongfully dishonoring past decisions, would international trade law really be better off?

### 3. Appellate Body Indecision and Its Adverse Consequences

Lest too much praise be heaped on the Appellate Body for its *Korea Beef* decision, it is worth inquiring how it managed to wind up with such an indecisive result on Korea's calculation, and the Panel's recalculation, of subsidies to the beef sector and overall support paid to agriculture. Pursuing that inquiry leads to an unpleasant realization. In different parts of the same opinion, the Appellate Body can perform magnificently and, well, dreadfully.

In brief, the Appellate Body re-examined the language of the Agriculture Agreement that defined "Current AMS," *i.e.*, Article 1(a)(ii).<sup>79</sup> Pulling out, yet again, its copy of *The New Shorter Oxford English Dictionary* (1993) and *The Concise Oxford English Dictionary* (1995), the Appellate Body pondered the meaning of words like "accordance" and "taking into account" that are found in that provision.<sup>80</sup> Apparently, the lexicographic sources were of little assistance, insofar as the Appellate Body seemed at times to confuse itself (not to mention many readers).

The Appellate Body said that there could be a conflict between calculating Current AMS for an agricultural sector (*e.g.*, beef) in "accordance" with Annex 3 and "taking into account" any "constituent data and methodology" found in the tables of a WTO Member's Schedule. It suggested that higher priority ought to be given to the

79. See *supra* note 30 and accompanying text (quoting this provision).

80. See *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 111 nn.46-47.

provisions of Annex 3 than to constituent data and methodology, because “‘in accordance with’ reflects a more rigorous standard than the term ‘taking into account.’”<sup>81</sup> Perhaps this suggestion will go down as one of the low points in Appellate Body reasoning during the first decade of its life. Yet, to the chagrin of even the avid reader of Appellate Body reports, it pressed on by declaring it unnecessary to resolve the conflict. After all, in the case at bar, there were no constituent data and methodology for Korea’s beef sector, so the Appellate Body agreed that the Panel was right to try recalculating the figures in accordance with Annex 3.

Thereupon, the Appellate Body embarked on a page-long mystifying analysis of an argument made by Korea. The argument was that a WTO Member’s Schedule of commitments on the reduction of agricultural subsidies “can be understood as multi-year equations.”<sup>82</sup> Rarely in the annals of Appellate Body reports has the relevance of an argument or the need to treat it in excruciating detail been less apparent. Following that discussion, the Appellate Body assessed the errors the Panel had found in Korea’s calculation of its Current AMS for beef. With a fair degree of effort, the committed reader of the several paragraphs devoted to this topic can detect two errors the Panel had spotted and the Appellate Body agreed were mistakes.

First, Korea used data from the wrong base period years. Under Annex 3 of the Agriculture Agreement, Korea should have computed its beef-specific AMS for 1997 and 1998 on the basis of external reference prices from data for 1986-88. Instead, Korea used external reference price data from 1989-91. (External reference prices are important because they are one of three variables needed to calculate the degree of market price support a WTO Member offers to a sub-sector.<sup>83</sup> The degree of support is the difference between (1) the external reference price, on the one hand, and (2) the government-determined price level, on the other hand. That difference is then multiplied by (3) the quantity of production eligible to receive support.<sup>84</sup> The result is the Current AMS for the product in question.) Why did Korea use a different period than the one set forth in the Annex? Essentially, because it used the 1989-91 period for all products other than rice—namely, barley, soybeans, maize (corn), and rape seeds—and because the figures from that period were in keeping with the “constituent data and methodology.”

The second error Korea made in computing its Current AMS for beef for 1997

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81. *Id.* ¶ 112.

82. *See id.* ¶ 115.

83. *See Agreement on Agriculture*, Annex 3 ¶¶ 8-9 (defining “market price support”), reprinted in *HANDBOOK*, *supra* note 10, at 328. As indicated above, and in Paragraph 9 of Annex 3, the external reference price must be based on the years 1986-89, and generally is the average CIF price (per unit of the agricultural product) in the importing country, and the average FOB (free on board) price (again, per unit) in the exporting country.

84. Hypothetically, suppose the external reference price for Korean beef were (in U.S. dollars) ten dollars per kilo, and the Korean government set an administered price of fifteen dollars. The difference is five dollars. Assuming that 1,000 kilos of Korean beef were eligible for support payments, then the AMS for beef would be \$5,000.

and 1998 concerned the quantity of beef eligible for market price support. Korea used the quantity of Hanwoo cattle actually purchased. The Appellate Body agreed with the Panel that Korea should have focused on the entire number of cattle “eligible” to receive the administrative price set by the Korean government, rather than on the number of cattle actually purchased. Here again, readers were treated to a brief discourse on the meaning of a word (“eligible,” found in Paragraph 8 of Annex 3 to the Agriculture Agreement), with the Appellate Body making use of another dictionary, *The Concise Oxford English Dictionary* (1995).<sup>85</sup> No doubt, the Appellate Body enlightened readers who might not have had farm experience (or at least agricultural instincts) when it pointed out that “[p]roduction actually purchased may often be less than actual production.”<sup>86</sup> In other words, Korea may have understated its Current AMS for beef by understating the quantity of cattle eligible for support payments.

Were it only the case that, having shown the stamina to endure the Appellate Body’s prose on Korea’s AMS commitment levels, Current AMS for beef, and Current Total AMS, the reader would be rewarded by the Appellate Body with a decisive result. As indicated earlier, there was no such reward. In three short paragraphs,<sup>87</sup> the Appellate Body faulted the Panel for relying on market price support calculations submitted by New Zealand for Korea’s Current AMS for beef. The Panel cribbed from New Zealand’s arithmetic to conclude that Korea’s AMS for beef had exceeded the ten percent *de minimis* threshold in Article 6:4(b) of the Agriculture Agreement. Why not, if that was the clear and simple way of resolving the case, as the Panel indicated? Unfortunately for the strong reader, the Appellate Body preferred to worship at the cult of intricacy, risk the sin of scrupulosity, or both.

The Appellate Body pointed out (and the reader probably can be forgiven for musing, “God forbid!”) that New Zealand had used external reference price data from 1989-91, just as Korea had done. Yet, Annex 3, paragraph 9, of the Agriculture Agreement required data from 1986-88; hence, New Zealand was hardly a role model. Yes, the Appellate Body acknowledged, the Panel was aware of New Zealand’s data source. The Panel apparently had assumed the incongruity benefited Korea (because it resulted in a higher external reference price than would have been derived from the 1986-88 period).<sup>88</sup> But, the Panel did not make its assumption explicit, and the Appellate Body said it could go no further (whereupon the same reader may respond “Thank God!”).

In sum, the Appellate Body did not render a final verdict as to whether Korea had violated these Articles of the Agriculture Agreement. After an analysis tiresome to even the most enthusiastic trade lawyer, the Appellate Body did not say whether Korea’s Current Total AMS actually had exceeded its commitments for 1997 and 1998. Rather, the Appellate Body said the factual aspects of the case were

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85. See *Korea Beef* Appellate Body Report, *supra* note 11, ¶ 120 n.57.

86. *Id.* ¶ 120.

87. See *id.* ¶ 123 (quoting the Panel’s statement about “clarity and simplicity”).

88. See *id.* ¶ 125.

insufficiently developed at the Panel stage for it to perform a complete legal analysis.<sup>89</sup> At least, from the American perspective, the Appellate Body did not reject the Panel's verdict on these points.

Yet, as hinted at numerous points, the Appellate Body's discussion of the AMS issues—essentially, from paragraphs 94 to 129 of its Report—are unsatisfying in two respects. First, the Appellate Body's discussion is too long. Why burden the reader, whether he is a budding trade lawyer in Dhaka or a busy seasoned trade practitioner in Washington, D.C., with a dilated discussion that leads nowhere? If the answer were that the discussion is edifying in some respect, then perhaps the pedagogical value would justify the length. Arguably, that value does not exist in the aforementioned paragraphs of the *Korea Beef* Report, at least not the way they are written in relation to the effort that must be expended.

Second, the prose never simplifies the issues in a way that makes them sufficiently accessible. Only after several re-readings does some of the fog surrounding the issues begin to lift. The rebuttal to this criticism might be “who cares?” The answer is (other than our trade law students) lawyers from developing countries. If the WTO is serious about building legal capacity in the Third World, then the Appellate Body must play its part. On matters like agriculture, which are so vital to poor countries, how are budding trade lawyers in these countries served by such opacity?

In brief, the Appellate Body ought to see itself as having two global responsibilities that go far beyond resolving a dispute between two WTO Members. It is (or can be) an educator, and it is (or can be) an agent for capacity building. As an educator, it has the potential to teach the world about the rules of trade and to have respect for this large and evolving body of law. As an agent for capacity building, it has the potential to help lawyers in Third World countries become better able to represent their clients and countries in trade disputes. Both responsibilities depend on the quality of the Appellate Body's writing and reasoning. To be sure, it has risen to meet them occasionally (as the discussion below of the *Hot-Rolled Steel* case indicates). Sadly, it missed a chance in a key part of its *Korea Beef* Report.

#### 4. Developing Countries and Enforcement Resources

One of the points the Appellate Body made in its disposal of Korea's GATT Article XX:(d) defense to America's Article III:4 claim may prove to have important implications for developing countries. Korea argued that the dual retail system was “necessary” under Article XX:(d), above and beyond traditional enforcement mechanism, because Korea was aiming for a higher degree of enforcement of its Unfair Competition Act in the beef market than in other product markets. The Appellate Body agreed that WTO Members have the sovereign right to decide the level of enforcement they would like to achieve in their laws and regulations that are

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89. *Id.* ¶ 186(d).



consistent with their GATT-WTO obligations. It also cast doubt on a level of protection that completely eliminates all illegal behavior, like fraud with respect to the origin of beef (imported or domestic) sold by Korean retailers.

The Appellate Body rejected Korea's plea for the dual retail system owing to its lack of enough policemen to check thousands of shops, twenty-four hours a day, seven days a week. To be sure, Korea was arguing in a rather contradictory way. It was saying, on the one hand, that it sought a uniquely high degree of enforcement against fraud and deception in the beef market, but on the other hand, that it did not have the police to attain such degree of consumer protection. For Korea, the way out of the contradiction was the dual price system. It is not difficult to imagine examples from developing countries of trade-restrictive measures justified by those countries with the same logic. Many such examples might surface in China as its trading partners bring WTO actions against it. China (or other developing and transition-economy countries) could argue that in the absence of law enforcement resources—money and policemen—it has no choice but to implement more draconian rules that are inconsistent with certain GATT obligations like national treatment.

If the Appellate Body's ruling in *Korea Beef* is a harbinger of how it will respond to such arguments, then respondents have good reason to be pessimistic. (And, critics of the Appellate Body, who contend that it infringes on sovereign decision-making, may feel emboldened.) The Appellate Body essentially said Korea was not trying hard enough to focus its scarce resources on probable violators.

We are not persuaded that Korea could not achieve its desired level of enforcement of the *Unfair Competition Act* with respect to the origin of beef sold by retailers by using conventional WTO-consistent enforcement measures, if Korea would devote more resources to its enforcement efforts on the beef sector. It might also be added that Korea's argument about the lack of resources to police thousands of shops on a round-the-clock basis is, in the end, not sufficiently persuasive. *Violations of laws and regulations like the Korean Unfair Competition Act can be expected to be routinely investigated and detected through selective, but well-targeted, controls of potential wrongdoers. The control of records will assist in selecting the shops to which the police could pay particular attention.*<sup>90</sup>

(The Appellate Body added that the enforcement costs of a scheme that discriminates against imported products in violation of Article III:4, like Korea's dual retail system, tend to fall lopsidedly on importers and retailers of imported goods. In contrast, non-discriminatory measures might well fall evenly on importers and producers of like domestic products, and on retailers of both types of products.) The above-quoted language may well be characterized in the future as *obiter dicta*. However, *dicta* in

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90. *Id.* ¶ 180 (emphasis added).

one case about the feasibility of implementing a less-trade restrictive measure surely can be the basis for an outright holding in a later WTO dispute.

## **B. The Environment and the *French Asbestos Case***

### ***Citation:***

***European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*** (complaint by Canada, with Brazil and the United States as Third Party Participants) WT/DS135/AB/R<sup>91</sup>

The DSB adopted the Appellate Body Report and Panel Report, as modified by the Appellate Body Report, on 5 April 2001.

### ***Explanation:***

#### **1. Facts and Overview**

The Government of France enacted, effective January 1, 1997, a decree that imposed prohibitions on the “manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres . . . regardless of whether these substances have been incorporated into materials, products or devices.”<sup>92</sup> The principal rationale for the action was to protect workers and consumers. Limited exceptions were permitted “on an exceptional and temporary basis,” where no less dangerous material is available for the purpose and where various safety concerns are met.

Canada challenged the measure under various provisions of the WTO Agreement on Technical Barriers to Trade<sup>93</sup> (hereinafter “TBT Agreement”) and of the General Agreement on Tariffs and Trade (“GATT”), as discussed below. The TBT Agreement is designed to recognize the importance of international standards, while seeking to “to ensure technical regulations and standards . . . do not create unnecessary obstacles to international trade.”<sup>94</sup> Under the TBT Agreement, a technical regulation is a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.”<sup>95</sup> The WTO Panel had decided that the import ban did not violate the TBT Agreement, but that it did constitute a violation of Article III:4 of the GATT. However, that action was nevertheless

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91. This analysis is based on the Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, [hereinafter *EC Asbestos Appellate Body Report*].

92. Decree No. 96-133 of Jan. 1, 1997; see *EC Asbestos Appellate Body Report*, *supra* note 91, ¶ 2.

93. Reprinted in HANDBOOK, *supra* note 10, at 354.

94. *Id.* Fifth Preambular Paragraph.

95. “It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.” *Id.* Annex I(1).

justified as an action “necessary to protect human, animal or plant life or health” under the GATT exception contained in Article XX(b).

The matter has taken on significance in the international trade and international environmental communities for two additional reasons. First, it represented the third major, controversial DSB case raising possible conflicts between trade rules and environmental measures, after *United States - Reformulated Gasoline*,<sup>96</sup> *European Communities - Hormones*,<sup>97</sup> and *United States - Shrimp*.<sup>98</sup> In the present case, one can argue that the Appellate Body went out of its way to show its friendliness to “green” issues by deciding that the “necessary to protect human . . . life or health” exception of Article XX(b) is applicable, even where the Appellate Body found no actionable violation of GATT, Article III:4, and thus was not required to deal with the exception. Secondly, it was probably the first major proceeding in which the Appellate Body attempted to create a detailed procedure for receiving non-governmental organization (NGO) submissions as part of the normal briefing process,<sup>99</sup> even though there is no provision in the DSU for such submissions. This action of the Appellate Body resulted in considerable unhappiness among the members of the WTO’s General Council,<sup>100</sup> even after the Appellate Body rejected all of the NGO submissions.

## 2. Principal Issues on Appeal<sup>101</sup>

The principal issues raised in the appeal were:

- a. Whether the French Decree was a “technical regulation” and thus subject to the provisions of the TBT Agreement;

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96. *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996), available at <http://www.wto.org>.

97. *European Communities - Measures Affecting Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998), available at <http://www.wto.org>.

98. *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998), available at <http://www.wto.org> [hereinafter *United States - Shrimp*].

99. See Communication from the Appellate Body, in *EC Asbestos* Appellate Body Report, *supra* note 91. In *United States - Shrimp*, *supra* note 98, ¶ 110, the Appellate Body disapproved a panel ruling that “the acceptance of information from non-governmental sources is incompatible with the provisions of the DSU.” The Appellate Body also confirmed in that case the right of any Party under the DSU to attach briefs of non-government organizations to its own submissions.

100. The General Council is a committee of the entire membership. See *WTO Members Warn Appellate Body on Amicus Procedures*, INSIDE U.S. TRADE, Dec. 1, 2000 (electronic edition); Part 4, *infra*.

101. See *EC Asbestos* Appellate Body Report, *supra* note 91, ¶ 58.

- b. Whether asbestos and substitute (but non-carcinogenic) fibers constitute “like products” under Article III:4 of GATT, as there can only be actionable discrimination under that provision if there is differential treatment of like products;
- c. Whether the French Decree was justified as an action “necessary to protect human . . . life or health” under Article GATT Article XX(b); and
- d. Whether the non-violation language of Article XXIII:1(b) applies to measures that are also violations and to health and safety measures.

### 3. Arguments of the Parties<sup>102</sup>

#### a. TBT Agreement

The WTO Panel had decided that the French Decree did not meet the definition of “technical regulation” under the TBT Agreement, which meant that the requirements of the TBT Agreement did not apply. Canada disagreed, arguing that a “technical regulation” could be a general prohibition on the importation of a product, such as that found in the French Decree, without a requirement that detailed technical characteristics be identified. According to Canada, the Decree was a violation of Article 2.2 of the TBT Agreement, on the grounds that “there is no rational connection between the Decree and France’s objective of protecting human health.” This was based in part on the assertion that there is a less-trade-restrictive alternative, namely the “controlled use” rather than an outright ban on chrysotile-cement [asbestos] fibers. (In this respect, the analysis is the same as under the *chapeau* of Article XX.) There were also relevant “international standards” for the controlled use of asbestos fibers, which when implemented could achieve France’s objectives without the ban; therefore, Article 2.4 of the TBT Agreement was also violated.

Brazil and the United States concurred that the French Decree was a “technical regulation” under the TBT Agreement. Moreover, asbestos and the substitutes were not “like products” under Article 2.1 of the TBT Agreement, for the same reason as under Article III:4 of GATT. The “technical regulation” could only logically be expressed as a prohibition on the use of asbestos, since the international standards on asbestos were “neither relevant to, nor an effective or appropriate means of achieving, France’s public health objective.”

The European Communities (“EC”), in contrast, supported the Panel’s decision and pointed out that even if the Appellate Body decided that Canada’s claims were covered by the TBT Agreement, the absence of findings in the Panel record precluded the Appellate Body from making a determination. Since the Appellate Body could not make findings of its own but had to rely on the Panel for findings, the Appellate

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102. See *EC Asbestos* Appellate Body Report, *supra* note 91, ¶¶ 10-49.

Body can only make determinations if the Panel decision contained the necessary underlying findings. Moreover, the standards applicable to Article XX determinations were not the same.

#### b. Article XX(b) of GATT

Canada's principal criticism of the Panel report was that the Panel erred "in finding that there is a risk to human health associated with the manipulation of chrysotile-cement [asbestos] products." Canada simply did not accept the health risks associated with the products and rejected the idea that the health risks justified the import ban as "necessary" under the Article XX *chapeau*. In addition, the Panel failed to make an objective assessment of the scientific evidence presented to it and relied excessively on the experts assembled. The analysis, in the aggregate, did not meet the requirement that the Panel make an "objective assessment of the matter," as required under Article 11 of the DSU.

The European Communities contended that the Panel properly found that the Article XX(b) exception applied because the ban on asbestos was "necessary" based on the evidence presented. Once the EC established a *prima facie* case, it was Canada's obligation to demonstrate the absence of a health risk, which Canada did not do. Moreover, Canada had no grounds under Article 11 of the DSU to object to the Panel's reliance on the scientific facts before it, since Canada did not object to the selection of experts relied on by the Panel, and even proposed one of them. For the United States, the question was whether the Panel complied with its mandate under Article 11 of the DSU in assessing the facts before it and correctly concluded that the French Decree was necessary to protect human health under Article XX(b). The answer was "yes."

#### c. Like Products Analysis under GATT Article III:4

Canada supported the Panel's analysis whereby the Panel considered that the "dangerousness" of the product was not a factor to be considered in determining "likeness" under Article III:4. The issue was whether asbestos and its substitutes were "like" in regard to competitive conditions.

The EC contended that asbestos fibers were not "like" substitutable fibers such as polyvinyl alcohol, cellulose, and glass fibers—collectively, "PCG" fibers. Article III:1 defines the objective and purpose of Article III as "to provide equality of competitive conditions for imported products in relation to domestic products." The analysis of "like" should not, however, have focused exclusively on commercial conditions. In particular, the analysis should not have excluded the principal reason for the French Decree banning asbestos, namely, that all asbestos fibers are carcinogenic, while the substitutes are not. The Panel further erred in concluding that such health and safety concerns could be taken into account only in analyzing the

applicability of Article XX(b). Finally, the Panel ignored the fact that Article III:4, unlike Article III:2 (with its Interpretative Note), does not apply to “directly competitive or substitutable” products.<sup>103</sup> The United States was in the unusual situation of supporting the EC; in deciding that asbestos and its non-carcinogenic substitutes were like products, the Panel “ignored the single most important distinguishing feature between asbestos and its substitutes.”

#### d. Non-Violation Remedies Under Article XXIII:1(b)

The EC challenged the Panel’s conclusion that Article XXIII:1(b) applies to situations that are also inconsistent with the GATT. Historically, the non-violation remedy is an exceptional one “designed to prevent the circumvention of tariff concessions.” If a measure qualifies as an exception under Article XX(b), the same measure may not be a nullification or impairment under Article XXIII, as the Member’s legitimate expectations (regarding a tariff concession) “cannot be assessed without examining the health measure itself and the balance of interests underlying that law.”

For Canada, it would have been best if the Panel and Appellate Body, on judicial economy grounds, had refused to rule on the non-violation issue, since a ruling on that issue was not necessary to resolve this case and since Article 3.2 of the DSU discourages the Appellate Body from making law through clarifying provisions of the WTO agreement when unnecessary to resolve a particular dispute. If the issue is addressed, the Appellate Body should confirm that a measure justified under Article XX(b) nevertheless could nullify or impair benefits anticipated under Article XXIII:1(b).

### ***Rationale and Holdings:***<sup>104</sup>

#### 1. Note on the “Preliminary Procedural Matter” - NGO Briefs

On November 8, 2000, the Appellate Body issued instructions to non-party/non-third-party participants in the proceeding as to how they might apply for leave to file written briefs.<sup>105</sup> Those instructions, issued on the basis of Article 16(1) of the

103. See GATT art. III, ¶ 2, applicable to tax measures under Article III:2.

104. See *EC Asbestos* Appellate Body Report, *supra* note 91, ¶¶ 59-193, for the holdings.

105. See Additional Procedure Adopted Under Rule 16(1) of the *Working Procedures for Appellate Review*, WT/DS135/9, Nov. 8, 2000. The Working Procedures provided, *inter alia*, that an application for leave to file a brief should “(d) specify the nature of the interest the applicant has in this appeal; (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel . . . which the applicant intends to address in his written brief; (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue . . . for the Appellate Body to grant the applicant leave to file a

Working Procedures for Appellate Review<sup>106</sup> went well beyond the limited approval given to NGO briefs in the course of *United States - Shrimp*.<sup>107</sup> Interested entities were given until November 16, eight days later, to file both an application for leave to file a written brief and the brief itself.<sup>108</sup> The latter was to be limited to no more than 20 typed pages, including appendices.

It would be an understatement to say that this unusual action by the Appellate Body caused consternation among most members of the WTO. A committee of the membership, the General Council, debated the Appellate Body's action in a special session on November 22, 2000, and instructed the Appellate Body to act "with extreme prudence" regarding the acceptance of briefs from non-governmental organizations.<sup>109</sup> The General Council apparently considered an outright revocation of the Appellate Body's suggested procedure but stopped short of that, seeking, rather, "to advise the Appellate Body without trespassing on their territory," only the United States having expressed support.

The Appellate Body received the message loud and clear. Of a total of 17 applications received from NGOs for leave to file briefs, six were rejected because they were filed after the November 16 deadline. The other eleven requests, which were all timely filed, were all rejected on grounds that they did not meet all of the criteria specified in the "Additional Procedure."<sup>110</sup> Apparently, the rejections were notified to the parties and to the NGOs on November 21, one day before the General Council meeting!<sup>111</sup> It is speculation to suggest that the Appellate Body rejected all the briefs in order to avoid further criticism by the General Council, but the timing of the determination seems more than coincidence.

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written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute . . ."

106. Article 16(1) provides:

In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by the Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the Division shall immediately notify the participants and third participants in the appeal as well as the other Members of the Appellate Body.

107. See *United States - Shrimp*, *supra* note 98, relating to the Appellate Body's approval of the United States' action in that case of attaching certain NGO briefs to and effectively making them a part of the United States' brief.

108. See *EC Asbestos* Appellate Body Report, *supra* note 91, ¶¶ 50-52.

109. WTO Members Warn, *supra* note 100, at 1.

110. *EC Asbestos* Appellate Body Report, *supra* note 91, ¶¶ 55-56.

111. WTO Members Warn, *supra* note 100, at 1.



## 2. France's Measure is a "Technical Regulation" Under TBT Agreement Article 1.1

The Appellate Body did not accept the Panel's conclusion that a measure could constitute a "technical regulation" only if it affects one or more given products, specifies the technical characteristics of the product or products, and provides for mandatory compliance.<sup>112</sup> It noted that the French Decree contemplated both a prohibition on asbestos and a series of limited and temporary exceptions to their usage. Treating the measure, as the Panel did, as a general prohibition, is an oversimplification. Instead, the Appellate Body determined it necessary to examine the Decree "as an integrated whole." When this approach is taken, it is clear that the Decree meets the requirements of "technical regulation." Under the TBT Agreement, a "technical regulation" laying down product characteristics may be such even if it lays down only one or a few such characteristics. It does not have to be detailed to be a technical regulation.

While the Decree, if it were only a ban on asbestos fibers, might not have constituted a technical regulation, such was not the case here. The regulation of products containing asbestos fibers, which were also prohibited, was an integral part of the Decree even if it was expressed in the negative. Thus, the products the measure covered were identifiable, and the prohibition was mandatory and even enforceable through criminal sanctions. Viewed as a whole, the Decree "lays down 'characteristics' for all products that might contain asbestos" and "applicable administrative provisions' for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure." Accordingly, it was a "technical regulation" under the TBT Agreement. The Appellate Body noted that not all internal measures covered by Article III:4 of GATT will necessarily qualify as "technical regulations" under the TBT Agreement. The ruling was limited to this particular Decree.

Unfortunately, perhaps for Canada, the Appellate Body declined to analyze the applicability of the TBT Agreement, on the grounds that it could do so only "if the factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis." Here, this was not the case. However, the Appellate Body noted that the TBT Agreement is a "specialized legal regime" that "applies solely to a limited class of measures." It thus imposes obligations that "seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994."

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112. See Panel Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 8.57 [hereinafter *EC Asbestos Panel Report*] (complaint by Canada, with Brazil and the United States as Third Party Participants).

### 3. Health Risks are a Valid “Like Product” Factor under GATT, Article III:4

Did the Panel err in its like products analysis and, in particular, “in excluding from its analysis consideration of the health risks associated with chrysotile asbestos fibres” as the EC and the United States contend? Article III:4 provides in pertinent part:

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation distribution or use. . . . (Emphasis added).

This, according to the Appellate Body, was a case of first impression regarding the use of the term “like products” in Article III:4 of GATT 1994 and the concept in other provisions has been analyzed in literally dozens of cases under GATT Articles I, II, III, VI, IX, XI, XIII, XVI and XIX.<sup>113</sup>

After observing that dictionary definitions were not much help because they did not provide guidance as to which characteristics were important or the degree to which products had to share characteristics in order to be “like,” the Appellate Body turned, as “context” under Article 31 of the Vienna Convention on the Law of Treaties, to Article III:2 of GATT (which is narrower than Article III:4 in the sense that Article III:2 deals only with discrimination regarding internal taxes and charges). There, a narrow scope had been given to “like.” The Appellate Body also looked to Article III:1, which provides the “general principle.” In particular, the Appellate Body noted that in *Japan - Alcoholic Beverages*,<sup>114</sup> it construed the concept of “like” narrowly, relying on Article III:1. Therefore, in construing Article III:4, the Appellate Body determined that it should rely on this same “general principle” rather than on Article III:2 (even though Article III:1 does not mention the word “like”). Moreover, any analogy with Article III:2 is complicated by the fact that the article “contains *two separate* sentences, each imposing *distinct* obligations,” a characteristic that is not in common with Article III:4.

The Appellate Body described the “general principle” of Article III:1 as designed

to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III “is to ensure that internal measures ‘not be applied to imported and

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113. See *EC Asbestos* Appellate Body Report, *supra* note 91, at n.59; see, e.g., Raj Bhala & David Gantz, *WTO Case Review 2000*, 18 ARIZ. J. INT’L & COMP. L. 1, 41-42 (discussion of *Chile - Taxes on Alcoholic Beverages*) [hereinafter *WTO Case Review 2000*].

114. *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Nov. 1, 1996).

domestic products so as to afford protection to domestic production.” Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions for imported products in relation to domestic products*. . . . Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. . . .<sup>115</sup>

This Article III:1 principle “informs” Article III:4, acting “as a guide to understanding and interpreting the specific obligations contained” in Article III:4 and other Article III paragraphs.

Thus, the use of “likeness” in Article III:4 is “fundamentally, a determination about the nature and extent of a competitive relationship between and among products.” However, likeness alone does not establish a violation of Article III:4; there still must be a showing that imported like products receive “less favourable treatment” than domestic like products. Likeness determinations imply an examination of a variety of factors, including their properties, end uses, consumers’ tastes and habits, and the tariff classification, although this is not a closed list of criteria.

The Panel had focused on market access and the same applications or end uses of asbestos fibers and its principal substitutes (so-called PCG fibers, PVA, cellulose and glass) but did not examine physical properties. The Panel’s likeness determination was largely (and erroneously) based on finding a “small number” of shared end uses of asbestos fibers and PCG fibers. There was no evidence in the record regarding the “nature and extent of the many end uses . . . which are not overlapping.” Most significantly, the Panel did not look at the carcinogenicity or toxicity, even though that constitutes “a defining aspect of the physical properties of chrysotile asbestos fibres . . . [; the Appellate Body did] not see how this highly significant physical difference *cannot* be a consideration examining the physical properties of a product as part of a determination of ‘likeness’ under Article III:4 of GATT 1994.”<sup>116</sup> Thus, the Appellate Body held that the Panel should not have excluded “the health risks associated with chrysotile asbestos fibres from its examination of the physical properties of that product.” Under the same rationale, and because of the primacy of the health risks, cement-based products containing asbestos fibers and their cement-based competitors containing substitute fibers were not “like” products.

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115. *EC Asbestos* Appellate Body Report, *supra* note 91, ¶ 97, quoting *Japan - Alcoholic Beverages*, *supra* note 114 (emphasis added).

116. A concurring member of the Appellate Body put it even more strongly, “It is difficult for me to imagine what evidence relating to economic competitive relationships as reflected in end-uses and consumers’ tastes and habits could outweigh and set at naught the undisputed deadly nature of chrysotile asbestos fibres, compared with PCG fibres, when inhaled by humans, and thereby compel a characterization of ‘likeness’ of chrysotile asbestos and PCG fibres.” *EC Asbestos* Appellate Body Report, *supra* note 91, ¶ 152.

Based on the finding that asbestos fibers and their non-carcinogenic substitutes, or cement-based asbestos products and substitute (PCG) products, were not like products, the French Decree was not inconsistent with Article III:4. Canada thus failed to meet its considerable burden of providing that asbestos and substitute (PCG) fibers were “like” products.

#### 4. The French Decree is within the Scope of GATT, Article XX(b)

Article XX(b) reads in pertinent part as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of *measures*

. . . .  
(b) *necessary to protect human, animal or plant life or health* . . .  
(Emphasis added).

Canada had challenged the Panel’s decision both as to whether asbestos products pose a risk to human health and whether the French Decree is “necessary to protect human . . . life or health” under Article XX of GATT 1994. In particular, Canada questioned the Panel’s analysis of multiple factors, all relating to the scientific evidence before the Panel, that led it to conclude that the Decree “falls within the range of policies designed to protect human life or health . . .”<sup>117</sup> Here, as in *United States - Wheat Gluten Safeguard* and *Korea - Alcoholic Beverages*, the Appellate Body suggested that the Panel should be given relatively broad discretion as the trier of facts, without the Appellate Body “second-guessing” the Panel’s assessment of the available evidence. The Appellate Body noted that Canada is effectively challenging the Panel’s “assessment of the credibility and weight to be ascribed to the scientific evidence before it,” and ultimately, the Appellate Body was not willing to disturb that finding.

In determining whether the ban on asbestos was “necessary,” the Panel had concluded that the European Communities had made a *prima facie* case, given that “there is a high enough risk associated with the manipulation of chrysolite cement products that it could in principle justify strict measures such as the Decree.”<sup>118</sup> Once again, the Appellate Body was convinced that the evidence before the Panel was more than sufficient to justify its conclusion.

Nor was Canada successful in challenging the level of protection the French

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117. *EC Asbestos* Panel Report, *supra* note 112, ¶ 8.194.

118. *EC Asbestos* Panel Report, *supra* note 112, ¶ 8.222.

Decree afforded. The Appellate Body recognized that a question arose as to “whether there [was] an alternative measure that would achieve the same end and is less restrictive of trade than a prohibition.” However, “the WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation.” A prohibition of certain types of asbestos and severe restrictions on the use of other less dangerous types is within the scope of this right. Nor was it reasonable to expect France to “employ *any* alternative measure—such as controlled use—if that measure would involve a continuation of the very risk that the Decree seeks to ‘halt.’”

Finally, the Appellate Body confirmed that the Panel complied with its obligations under Article 11 of the DSU in making an objective assessment of the matter. This, too, related to Canada’s challenge of the Panel’s assessment of the evidence before it. Moreover, Canada at no time objected to the choice of any of the many experts on which the Panel relied.

#### 5. Nullification or Impairment Under GATT Article XXIII:1(b)

According to the Appellate Body, this was the Appellate Body’s first opportunity to examine the scope of Article XXIII:1(b), the so-called non-violation provision.<sup>119</sup> The Appellate Body first observed that Article XXIII:1(a) provides “a cause of action for a claim that a Member has failed to carry out one or more of its obligations under GATT 1994.” Article XXIII:1(b), in contrast, provides a separate cause of action for nullification and impairment, whether or not the measure conflicts with GATT. Thus, it is obviously possible to have a nullification or impairment situation if there is no GATT violation. The Appellate Body cautioned, nevertheless, that Article XXIII:1(b) “should be approached with caution and should remain an exceptional remedy.”<sup>120</sup> However, the language of Article XXIII:1(b) indicates that even if a measure conflicts with another provision of GATT, the measure may nevertheless be cognizable under that provision as a nullification and impairment. In other words, Article XXIII:1(a) and Article XXIII:1(b) are not in this respect mutually exclusive. Since Article XXIII:1(b) uses the term “any” measures, it follows that health measures are among those which may establish a cause of action under the provision. In so holding, the Appellate Body rejects the EC’s assertion there may be no nullification or impairment where the GATT Article XX exceptions related to “health

119. GATT art. XXIII(1)(b) states: “If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of... the application by another contracting party of any measure, *whether or not it conflicts with the provisions of this Agreement* . . . the contracting party may . . .” take certain actions leading to the establishment of a panel (emphasis added).

120. *EC Asbestos* Appellate Body Report, *supra* note 91, *citing and quoting Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, ¶ 10.37 (Apr. 22, 1998).

objectives” are operable.

**Commentary:**

1. The Appellate Body Stumbles in Seeking NGO Participation

For those concerned with the uneasy relationship between trade and the environment under the WTO, this is a case of some importance. First, in procedural terms, a very bold effort by the Appellate Body to set up appropriate procedures for receiving and evaluating briefs from non-governmental organizations was effectively nullified when the Appellate Body, only a few days later, rejected all NGO briefs that had been filed under the procedure. The result is to leave the status of NGO participation in the Appellate Body’s process at best uncertain. The General Council’s immediate and adverse reaction seems to have convinced the Appellate Body that the time was not ripe for a re-evaluation of the role of NGOs in the proceedings. More recently, in connection with *Thailand - Antidumping Duties on Steel*,<sup>121</sup> in which the Appellate Body had accepted an unsolicited brief from the Consuming Industries Trade Action Coalition (CITAC), it was charged that a law firm representing Poland in the proceedings had improperly breached WTO confidentiality rules by providing confidential information from Thailand’s brief to CITAC.<sup>122</sup> None of this bodes well for the consideration of views of non-members in WTO proceedings, at least in the absence of action by the organization itself to provide for such consideration.

2. Health Concerns are Relevant to the “Like Product” Determination Under GATT Article III:4

The Appellate Body effectively determined that the analysis of “like product” under Article III:4 should *not* be limited to commercial considerations. Rather, if the potential health risk of one of the products being compared is a significant factor in affecting the use of the products, it must be factored in as part of the process of determining if discrimination exists. The health risk, like commercial considerations, does in fact affect “internal sale, offering for sale, purchase, transportation, distribution or use.” It is *not* enough to leave health considerations to the analysis of the applicability of Article XX(b). While one can argue the practical desirability of the Panel’s relegation of health concerns to Article XX(b), confining the “like product” analysis under Article III:4 to commercial and trade considerations, the environmental community should be buoyed by this aspect of the Appellate Body’s determination.

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121. See discussion *infra* pp. 541-53.

122. See Daniel Pruzin, *Dispute Settlement: WTO Members Say Amicus Briefs Caused Confidentiality Breach*, INT’L TRADE DAILY (BNA), Apr. 6, 2001, at D8.

### 3. The Appellate Body Confirms its Position as the “Greenest” of WTO Organs

Finally, the Appellate Body went out of its way to affirm the Panel’s determination that the French Decree banning asbestos and strictly regulating products containing asbestos was justified as “necessary” under the protection of human health exception provided in Article XX(b). Once the Appellate Body determined that asbestos and its less dangerous substitutes were not “like products,” there was no violation of Article III:4 by the French Decree, and thus no absolute need to resort to the exception in Article XX. Arguably, the Article XX issue became moot. Nor would the Appellate Body’s normal appreciation for “judicial economy” seem to support the need for this portion of the decision.

The most likely explanation—or speculation—is simply that the Appellate Body saw an excellent opportunity to further calm the environmental community by confirming the applicability of the human health exception in this case, as it had attempted to do in *United States - Shrimp* initially by holding that a United States law that sought to protect sea turtles through an embargo on shrimp caught with fishing methods that endangered sea turtles was a “measure ‘relating to’ the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994.”<sup>123</sup> (Also, when Malaysia challenged the United States’ implementation of the decision, the Appellate Body again upheld United States law, determining that it was justified under Article XX(g) of the GATT, which allows trade restrictive measures to be imposed in some circumstances where the measures are “relating to the conservation of exhaustible natural resources . . .” provided that the United States continues “the ongoing serious good faith efforts to reach a multilateral agreement. . . .”<sup>124</sup>) The inability of other organs of the WTO to deal effectively with trade and environmental conflicts has not prevented the Appellate Body from doing so, although its efforts have not been without controversy.

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123. See *United States - Shrimp*, *supra* note 98, ¶ 141. The Appellate Body nevertheless found that United States law was inconsistent with the GATT, since the measure constituted both unjustifiable and arbitrary discrimination (against Asian producers in favor of Western Hemisphere producers of shrimp) and was thus inconsistent with the *chapeau* of Article XX. See *EC Asbestos* Appellate Body Report, *supra* note 91, ¶¶ 176, 184; See *supra* p.514.

124. *United States - Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted Nov. 21, 2001, ¶ 153; see also Daniel Pruzin, *WTO: WTO Appellate Body Upholds Ruling Favoring U.S. in Shrimp-Turtle Dispute*, INT’L TRADE DAILY (BNA), Oct. 23, 2001, at D10.

## II. TRADE REMEDIES: ANTIDUMPING

### A. Zeroing and the Calculation of Constructed Value: The EC – Bed Linen Case

#### *Citation:*

*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (complaint by India, WT/DS141/AB/R).

The DSB adopted the Panel Report, as modified by the Appellate Body Report, on 12 March 2001.

#### *Explanation:*

##### 1. Facts<sup>125</sup>

In September 1996, the EC initiated an antidumping (“AD”) case against imports from India of cotton-type bed linen.<sup>126</sup> Interestingly, the member states of the European Union (“EU”) were split about the case. In 1997, the EU’s AD committee recorded a tie vote, seven-seven, with respect to the case, with Germany initially postponing and ultimately casting the tie-breaking vote.<sup>127</sup> The reason for support for the action was clear: to protect the EU’s fabric-weaving sector from low-priced import competition. Equally obvious was the reason for opposition to the action: job loss in companies that consumed the imports, like Britain’s Coats Viyella, Lonrho, and the Leeds Group—all of which incurred or faced redundancies as a result of the protective remedy.

The EC’s case was brought at the request of “Eurocoton,” a federation of

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125. This discussion is based on World Trade Organization, *Overview of the State-of-Play of WTO Disputes 22-23* (July 13, 2001), available at <http://www.wto.org>; Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ¶¶ 2.1-2.11, 6.49-6.87, 6.102-6.119 (Mar. 12, 2001) [hereinafter *Bed Linen* Panel Report].

126. Also included were imports from Pakistan and Egypt, which were third party participants in the WTO action.

127. See Jenny Luesby, *EU Split on Cotton Dumping Action*, FIN. TIMES, Mar. 21, 1997, at 7. Predictably, the *Financial Times* faulted the EU for hurting itself by imposing the duties, and characterized the EU’s dumping policy of being “too easily captured by producer lobbies, at the expense of wider economic interests.” *Dumping Folly*, FIN. TIMES, Apr. 1, 1997, at 21. There were at least two related actions: one against cotton-type bed linen from India, Pakistan, and Egypt, and another against certain unbleached cotton fabrics from India, Pakistan, Egypt, China, Turkey, and Indonesia. The aforementioned media accounts concern the latter action. See *India Seeks Talks with EU in WTO on Antidumping Duties on Textiles*, 15 Int’l Trade Rep. (BNA), at 1383 (Aug. 12, 1998).



associations of European producers of cotton textile products.<sup>128</sup> After excluding certain companies, there were 35 remaining petitioner producers, and they represented a major proportion of total EC production of bed linen. The period of investigation was July 1, 1995 to June 30, 1996, with the injury determination based on data from 1992 to June 30, 1996.

Because there were so many Indian producers and exporters of the subject merchandise, cotton-type bed linen, the EC elected to conduct its analysis of dumping on the basis of a sample of Indian companies. In determining the home (*i.e.*, Indian) market price for bed linen sold by the investigated respondents, the EC used Constructed Value (“CV”) as a substitute for Normal Value. The reason for using CV as a proxy for Normal Value was a lack of sales made in the ordinary course in the Indian market. The EC identified five types of cotton bed-linen exported to it and also sold in representative quantities in India. However, not all five types were sold in India in the ordinary course of trade. Thus, the EC could not base Normal Value on prices from these sales and had to use CV.<sup>129</sup>

The EC established the Export Price from prices actually paid or payable for cotton-type bed linen in the EC market and compared CV with the Export Price. This comparison involved weighted averages of CV and the Export Price, computed for each Indian respondent, with the dumping margin being the difference between the weighted average CV and the weighted average Export Price. (That is, for each Indian respondent, the EC calculated a weighted average dumping margin from the weighted average CV minus the weighted average Export Price.) In the computation, the EC applied a “zeroing” methodology. It deemed any negative dumping margin (where Export Price exceeds CV) to be zero. (Zeroing is explained more fully below.)

A notable feature of the way the EC went about calculating CV concerned selling, general and administrative (“SG&A”) expenses, and profits. One Indian respondent was a company called “Bombay Dyeing.” The EC obtained actual SG&A and profit data from Bombay Dyeing, and it used the data to calculate CV for that company. In addition, however, the EC used the same data—the SG&A and profit information from Bombay Dyeing—to come up with CV for all the other Indian respondents.

Regarding injury and causation, the EC found evidence of declining and inadequate profitability and of price depression. Therefore, it reached an affirmative finding of material injury to EC producers. This injury, said the EC, was caused directly by the increased volume of dumped merchandise and by the dumped prices. The evidence for causation was heavy price undercutting by Indian producers, which

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128. The formal name for Eurocoton was the “Committee of the Cotton and Allied Textile Industries of the European Communities.”

129. The *Bed Linen* Panel Report is not as clear as it might be on this point. It seems to indicate that this situation pertained to Bombay Dyeing, an Indian respondent, and that the EC then extrapolated the CV calculation to all the other respondents. See *Bed Linen* Panel Report, *supra* note 125, ¶ 2.6.

in turn led to a significant increase in the market share of Indian bed linen in the EC market and a concomitant negative effect on sales volumes and prices of European-made bed linen.

In June 1997, the EC imposed provisional AD duties on the subject merchandise. It imposed final duties in November 1997. Depending on the Indian respondent, the dumping margins, and hence the duties, ranged from 2.6 percent to 24.7 percent.

## 2. India's Many Unsuccessful Claims<sup>130</sup>

India alleged a large number of WTO-inconsistent actions by the EC in this case. India made most of its claims pursuant to the Uruguay Round Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement" or "AD Agreement").<sup>131</sup> Most of India's claims were unsuccessful. Specifically, the Panel rejected the following charges brought by India:

- Article 2:2 and 2:2:2 – Improper Construction of CV

India alleged that the EC acted inconsistently with Article 2:2:2 of the AD Agreement. This provision concerns the incorporation into CV of SG&A expenses and of profits. As Article 2:2 explains, CV is used as a proxy for Normal Value in the dumping margin formula (which is the difference between Normal Value and Export Price or Constructed Export Price) when two deficiencies exist. First, either an exporter's home market is not viable (in the sense that sales of the foreign like product in the home market are less than 5 percent of the sales of the subject merchandise in the importing country), or there are no home-market sales in the ordinary course of trade of the foreign like product. Second, there are no representative third-country prices that can be used to derive Normal Value. When both deficiencies exist, CV is used as a substitute for Normal Value.

CV is a "ground up" calculation, in contrast to the market-observed prices from which Normal Value in the home market or a third-country are derived. CV is calculated by summing the cost of production, along with a reasonable amount for SG&A expenses and profits. Article 2:2:2 makes clear that the calculation of CV must be based on actual data on production and sales in the ordinary course of trade made by the exporter or producer of the foreign like product that is being compared with the subject merchandise.

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130. This discussion is based on the sources cited in *supra* note 125.

131. The AD Agreement is *reprinted in* HANDBOOK, *supra* note 10, at 392-418.

The provision also anticipates the possibility that actual amounts for SG&A expenses, and for profits, will be indeterminable. In that event, Article 2:2:2 offers three alternative sources from which to derive data to make an adjustment. First, the data may come from sales of merchandise in the domestic market of the country of origin, where the merchandise is in the same general category of products as the like product. Second, it is possible to use a weighted average of actual amounts incurred and realized of SG&A expenses and profits, respectively, by other exporters or producers with respect to the like product as sold by them in the domestic market of the country of origin. Third, any other reasonable method may be used, as long as the amount adjusted for profit does not exceed the profit normally realized by other exporters or producers on sales of products in the same general category in the home market.

India's claim about the use of CV by the EC focused on profits. India alleged fault with the amount of profits calculated by the EC and included in CV.

- Articles 3:1 and 3:4 – Improper Determination of Injury

India contended that the EC ran afoul of Article 3:1 of the AD Agreement. This provision demands that a determination of injury, to be consistent with Article VI of the General Agreement on Tariffs and Trade (“GATT”), must be based on “positive evidence” and “involve an objective examination” of three variables: (1) the volume of dumped imports; (2) the effect of dumped imports on prices in the importing country of like products (*i.e.*, domestically-manufactured merchandise that competes with the dumped goods); and (3) the consequent impact of the dumped imports on producers in the importing country of like products.

India also contended that the EC failed to examine the impact of the dumped imports on the domestic industry in accordance with Article 3:4. This provision calls for a broad inquiry into “all relevant economic factors and indices having a bearing on the state of the industry.” It lists examples of several indicia, including (1) declines (actual and potential) in sales, profits, output, market share, productivity, return on investments, and capacity utilization; (2) domestic price suppression or depression; (3) the magnitude of the dumping margin; and (4) negative effects (actual and potential) on cash flow, inventories, employment, wages, growth, and the ability to raise new capital.

Essentially, on both the Articles 3:1 and 3:4 contentions, India argued that the EC was wrong, in its injury determination, to deem

all imports from India (plus those from Pakistan and Egypt) were dumped.<sup>132</sup>

- Article 3:5 – Failure to Identify and Distinguish Causal Factors

India alleged that the EC violated Article 3:5 of the AD Agreement, which concerns causation. This provision mandates a demonstration that the dumped imports cause injury to the domestic industry and that the causal relationship between dumping and injury be evident from an examination of all relevant evidence. Article 3:5 also calls for consideration of known factors other than dumping that, simultaneously with dumping, are injuring the domestic industry.

Examples of such factors could be competition from non-dumped imports, declines in demand for the domestically-produced like product, changes in consumption patterns, restrictive business practices, technological change, and poor productivity in the domestic industry. Any injury from these factors must not be attributed to injury caused by dumping (*i.e.*, the causal effects of each independent variable operating on the domestic industry must be separated from the other). India contended that the EC was wrong to analyze the state of the domestic industry by considering information about producers that comprised the domestic industry, but that were not among the sampled producers.

- Articles 5:3 and 5:4 – Improper Initiation of an Investigation

India contended that the EC was wrong to initiate an AD investigation in the first place, as it failed to comply with Articles 5:3 and 5:4 of the AD Agreement. Article 5:3 demands there be “sufficient evidence to justify” the commencement of an investigation, and it equates sufficiency with the “accuracy and adequacy of the evidence” provided to the relevant administrative authority. India claimed that the EC had not accounted for the accuracy or adequacy of the evidence in reaching its decision to start an AD case.

Article 5:4 sets forth the requirements for standing to file an AD petition. Two tests—the 50 and 25 percent tests—are

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132. As explained below, India found a separate factual predicate on which to base an additional claim under Article 3:4. See GATT art. 3:4, *infra* note 134.

articulated.<sup>133</sup> India alleged that the EC failed to administer these tests properly in deciding that domestic industry support existed for the AD petition.

- Article 12:2:2 – Failure to Give Public Notice

India alleged that the EC failed to comply with Article 12:2:2 of the AD Agreement. This provision concerns public notice and explanation of decisions. Specifically, it explains the elements of public notice following an affirmative dumping margin and injury determination and the imposition of an AD duty. Such notice must contain all relevant information about the facts of the case, applicable law, and rationale used to support the determination and imposition. The rationale itself must encompass not only why an argument was accepted, but also why a contrary argument was rejected—*i.e.*, the reasons for deeming positions as winning or losing must be explained. India claimed that the EC had not given adequate public notice of the final AD determination.

As suggested at the outset, on all of these claims, India lost. The Panel held that the EC did not violate any of the aforementioned provisions of the AD Agreement. Thus, if judged by the sheer number of claims alone, then India could be said to have lost the *Bed Linen* case.

However, that judgment would be specious. In actuality, India triumphed. At both the Panel and Appellate Body stage, India won a resounding victory on a technical but important claim under Article 2:4:2 of the AD Agreement.<sup>134</sup> This claim

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133. These tests are explained in HOUSE COMM. ON WAYS AND MEANS, 107TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 95 (Comm. Print June 2001). Essentially, domestic producers or workers representing at least 25 percent of total output of the like product must support the petition. Moreover, of the domestic producers or workers that express an opinion about the petition (either in favor or against), at least 50 percent must support the petition. (Domestic producers and workers abstaining from voicing an opinion would be included in the 25 percent, but not the 50 percent, test.)

134. See *Bed Linen* Panel Report, *supra* note 125, ¶¶ 6.114-6.119, 7:2(g); Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, ¶¶ 66, 86(1) (Mar. 12, 2001) [hereinafter *Bed Linen* Appellate Body Report]. India also prevailed at the Panel stage on two other claims, namely, that the EC violated (1) Article 3:4 of the AD Agreement by failing to evaluate all relevant factors bearing on the domestic industry, and by taking into account information from producers that were not part of the domestic industry in that determination; and (2) Article 15 of the AD Agreement by failing to explore alternative remedies before imposing AD duties. See *Bed Linen* Panel Report, *supra* note 125, ¶¶ 6.145-6.183, 7.2(h)-(i) (concerning Article 3.4), ¶¶ 6.219-6.238, 7.2(j) (concerning Article 15). Before the Appellate Body, the EC did not raise the Panel's findings in favor of India on these two claims. Accordingly, these claims are not discussed

concerned the zeroing methodology, alluded to above. That victory was over not only the EC, but also the United States, which entered the case as a third party and defended the EC's use of zeroing.<sup>135</sup> The American move was not surprising, in that the United States Department of Commerce ("DOC"), as well as the Canadian administering agency, sometimes employed a similar methodology.<sup>136</sup>

In addition, India won a clear-cut victory under Article 2:2:2 of the AD Agreement. This provision concerns the proper way to calculate certain types of expenses incurred, and profits realized, by an exporter or producer when computing CV. Like Article 2:4:2, it is a technical provision, but, also like Article 2:4:2, its application in practice can determine or significantly affect the outcome of a dumping margin calculation.

### 3. India's Successful Claim Against Zeroing<sup>137</sup>

India was not daunted by its string of losses on the claims discussed above. It pressed its claim on zeroing. And, both the Panel and Appellate Body accepted India's arguments about the EC's use of a zeroing methodology in the dumping margin calculation. These arguments arose under Article 2:4:2 of the AD Agreement.

India successfully argued to the Panel that the EC had breached Article 2:4:2 of the AD Agreement by determining the existence of positive dumping margins on the basis of a methodology involving "zeroing." "Zeroing" refers to treating all non-dumped sales as having a dumping margin of zero, and thereby preventing non-dumped sales from offsetting dumped sales. For example, suppose a sale of cotton-type bed-linen in Belgium were made at ECU 10 above CV (indicating no dumping, or "negative" dumping of 10), while a sale of the subject merchandise in Holland were made at ECU 10 below CV (indicating a positive dumping margin of 10). In the dumping margin calculation, but for the practice of zeroing, there would be no dumping—the Belgian sale exactly offsets the Dutch sale. Likewise, if the Belgian sale were at ECU 5 above CV, but for zeroing, the dumping margin would be reduced (to 5), because the negative dumping in the Belgian sale (-10) would offset in part the positive dumping in the Dutch sale (+10). Obviously, these results would be good news to a respondent like the Indian exporters of cotton-type bed-linen.

In actuality, however, the EC engaged in zeroing. It deemed all non-dumped sales to have a value of zero, no matter how far in excess the sales prices in EC of the

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above.

135. Daniel Pruzin, *EU Official Downplays Impact of Ruling in WTO Against Indian Bed Linen Duties*, 17 Int'l Trade Rep. (BNA), at 1706 (Nov. 9, 2000) [hereinafter Pruzin, *EU Official Downplays Impact*].

136. See Daniel Pruzin, *EU Offers to Review Antidumping Duties in Light of WTO Decision Against "Zeroing,"* 18 Int'l Trade Rep. (BNA), at 441 (Mar. 15, 2001); Guy de Jonquieres, *Brakes Slow Anti-dumping Bandwagon*, FIN. TIMES, Mar. 6, 2001, at 8.

137. This discussion is based on the sources cited in *supra* note 125.

subject merchandise—*i.e.*, the Export Prices—were above CV. So, in the above hypothetical, the Belgian sale would be treated as having a zero dumping margin; whether it were made at ECU 10 or ECU 5 above CV would be irrelevant. In any instance in which Export Price is above CV (or, for that matter Normal Value or a third-country price), the sale is treated as if Export Price exactly equaled CV. The effect of that treatment is that non-dumped sales cannot offset dumped sales. In the above hypothetical, abstracting from a weighted averaging, the dumping margin would be 10, based essentially on the Dutch sale.<sup>138</sup> With a weighted averaging of the Dutch and Belgian sales, the zero value ascribed to the Belgian sale, rather than the true value (-10), would result in an artificially high margin (nearer to +10 than it should be).

India's view was that zeroing was contrary to the requirement of Article 2:4:2, which not only echoes the need for a "fair comparison" between Normal Value (or its proxy) and Export Price, but also provides guidance on what that constitutes. Article 2:4:2 says that a weighted average for Normal Value (or its proxy) must, in normal cases, be compared with a weighted average of prices of all comparable export transactions. Alternatively, a comparison can be made between Normal Value and Export Price on a transaction-by-transaction basis. What generally is not permitted is to compare a figure for Normal Value determined by a weighted average with export prices from individual transactions. Only where the pattern of export prices differs significantly among buyers or regions in the importing country, or time periods would an average Normal Value to individual Export Price comparison be justified. The significant differences would justify disregarding certain export prices as distorted or unrepresentative.

In the actual case, the zeroing methodology used by the EC was a bit more complex than suggested by the hypothetical.<sup>139</sup> The EC divided the subject merchandise—cotton-type bed linen—into various product types (referred to in the Panel Report as "models"). The EC calculated a weighted average of Normal Value and Export Price for each product type. India did not attack this aspect of the EC's determination. Rather, India's focus was on how the EC treated product types with negative dumping margins. For some of these types, the EC found a positive

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138. Another hypothetical illustration was provided in one of the media accounts of the case:

In a simplified example, an investigating authority using zeroing would apply a zero value for a transaction where a good is sold for \$100 on the home market and \$130 in the export market, but would apply a 20 value for another transaction in which the good was sold for \$100 at home but for \$80 abroad. Thus, in aggregating the transactions, the authority using zeroing would find a dumping margin of 20 percent rather than the negative dumping result if the true value of the first transaction were used.

Daniel Pruzin, *WTO Appellate Body Upholds India in Ruling Against EU Bed Linen Duties*, 18 Int'l Trade Rep. (BNA), at 403 (Mar. 8, 2001) [hereinafter Pruzin, *WTO Appellate Body*].

139. See *Bed Linen* Panel Report, *supra* note 125, ¶ 6.102.

dumping margin, but for others it found a negative dumping margin. The EC calculated a weighted-average dumping margin for the subject merchandise, *i.e.*, an average dumping margin embracing all types of cotton bed linen. The weighting was based on the volume of imports of each of the product types. What India complained of under Article 2:4:2 of the AD Agreement was zeroing: in calculating this overall weighted average for cotton bed linen, the EC counted as zero any dumping margin for a product type that, in fact, was negative.

The Appellate Body explains with great clarity and specificity the EC's zeroing methodology:

[F]irst, the European Communities identified with respect to the product under investigation—cotton-type bed linen—a certain number of different “models” or “types” of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a “*positive* dumping margin” for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a “*negative* dumping margin” for each model. Thus, there is a “positive dumping margin” where there *is* dumping, and a “negative dumping margin” where there *is not*. The “positives” and “negatives” of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the amounts it had calculated as “dumping margins” for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any “negative dumping margin” as zero – hence the use of the word “zeroing.” Then, finally, having added up the “positive dumping margins” and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.<sup>140</sup>

In effect, as the Appellate Body's characterization suggests, the EC was not

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140. *Bed Linen* Appellate Body Report, *supra* note 134, ¶ 47 (emphasis added).



permitting negative dumping margins to offset positive dumping margins. Zeroing was a built-in pro-petitioner bias in the calculation.

Consider a hypothetical example. Suppose queen-size bed sheets (one product type or model) had an average dumping margin of ECU 50, while twin-size bed sheets (a second type or model) had an average dumping margin of ECU - 25. If these were the only two types of bed linen in the subject merchandise, and they were imported in equal volumes, then the weighted average dumping margin would be ECU 12.5. Yet, because of the EC's zeroing methodology, the weighted average dumping margin would be ECU 25 since the EC would count the margin corresponding to twin-size sheets as zero. The EC would not permit the negative dumping of these sheets to offset partly the positive dumping of the queen-size sheets.

How, asked India, could that methodology possibly be said under Article 2:4:2 to be a comparison of a weighted average Normal Value with weighted average or prices in comparable export transactions?<sup>141</sup> In truth, the EC had averaged only within product types (*i.e.*, calculating Normal Value and Export Price within a product type). Once the EC came to comparing product types, its practice of zeroing meant that the comparison was distorted. Pure, unadulterated weighted averages from the different product types were not compared because negative dumping margins were excluded from the calculation of an overall weighted average dumping margin and deemed to be zero dumping margins. The plain meaning of the word "average," said India, anticipates inclusion of all amounts for which the average is being calculated, not a selection of only certain figures to be averaged. This meaning is reinforced by the word "all" in Article 2:4:2, which calls for a "*weighted* average of prices of *all* comparable export transactions."<sup>142</sup> By riding roughshod over this language, the EC overstated the dumping margins for four Indian bed linen companies, and for a fifth company, it found a dumping margin where one did not, in truth, exist.<sup>143</sup>

The Indian argument against zeroing seems so strong that a persuasive rebuttal scarcely seems imaginable. How did the EC try to justify, under Article 2:4:2 of the AD Agreement, excluding negative dumping margins from its calculation of a weighted average dumping margin for cotton-type bed linen?<sup>144</sup> First, the EC said zeroing is directed at dumping, and focuses on types of bed linen where dumping exists as evidenced by a positive dumping margin. Product types that are not dumped still are included in the calculation of an overall weighted average margin, albeit at a zero (rather than negative), and thus still pull down the final result. As for the language of Article 2:4:2, it refers to "the existence of margins of dumping." That reference suggests a process of comparing weighted averages of more than one dumping margin. At the same time, the reference leaves to the discretion of each

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141. See *Bed Linen* Panel Report, *supra* note 125, ¶¶ 6.103-6.104.

142. See *id.* ¶ 6.104 and AD Agreement art. 2:4:2, *reprinted in* HANDBOOK, *supra* note 10, at 395 (emphasis added).

143. See *Bed Linen* Panel Report, *supra* note 125, ¶ 6.104.

144. See *id.* ¶¶ 6.105-6.106.

WTO Member the methodology for calculating a single, or overall, weighted average dumping margin. In other words, put more forcefully, Article 2:4:2 does not expressly forbid zeroing.

#### 4. India's Successful Claim on the Calculation of Constructed Value<sup>145</sup>

India also won a resounding victory on a second issue, at the Appellate Body (but not the Panel) stage. This issue pertained to the calculation of CV—the proper way to include SG&A expenses and profits in CV. India's claim arose under Article 2:2:2 of the AD Agreement.

India successfully argued to the Appellate Body, though not to the Panel, that the EC had violated Article 2:2:2 of the AD Agreement. This highly technical provision spells out a methodology for including SG&A expenses, and profits, in CV, whenever it is necessary to use CV as a proxy for Normal Value. Article 2:2 identifies “the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits”<sup>146</sup>—known as CV—as an acceptable substitute for Normal Value if the home market of the exporter or producer is not viable. The question is: What is a “reasonable amount” for SG&A expenses and profits? In any AD case, a petitioner will seek to include as many items in SG&A expenses and profits as possible, in order to maximize CV and thereby the dumping margin. In this zero-sum game of calculating the margin, the respondent will have precisely the opposite motivation: it will want CV to be as small as possible, to limit or eliminate any positive margin, and hence it will seek to minimize what counts as SG&A expenses and profits.

Article 2:2:2 of the AD Agreement is designed to regulate this aspect of the zero-sum game, and it does so by providing four distinct answers to the question of “reasonable amount” for SG&A expenses and profits. The first answer, set forth in the *chapeau* of Article 2:2:2, states that the amounts for SG&A expenses and profits, “shall be based on *actual data* pertaining to production and sales in the ordinary course of trade of the *like product by the exporter or producer under investigation*.”<sup>147</sup> The aim is to find out the actual SG&A expenses incurred and profits earned by each particular respondent in the case, with respect to the like product sold in the home market, and to include these amounts in the CV calculated for each respondent.

Obviously, the EC did not realize this aim. It applied statistics from Bombay Dyeing not only to that company, but to the other Indian exporters and producers as well. That fact, in itself, created problems. As just intimated, Article 2:2:2 of the AD Agreement does list three further choices, after the *chapeau*, the latter two of which acknowledge that actual data on SG&A expenses and profits, may not be available for

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145. This discussion is based on the sources cited *supra* note 125.

146. AD Agreement art. 2:2, *reprinted in* HANDBOOK, *supra* note 10, at 393.

147. AD Agreement art. 2:2:2, *reprinted in* HANDBOOK, *supra* note 10, at 394.

each individual exporter and producer in a case. These alternatives are set forth in sub-paragraphs (i), (ii), and (iii), as follows:

- (i) the *actual amounts incurred and realized by the exporter or producer in question* in respect of production and sales in the domestic market of the country of origin of the *same general category* of products [*i.e.*, in effect, a restatement of the first choice set forth in the *chapeau*, though with respect not to the like product, but the same general category of products];
- (ii) the *weighted average* of the actual amounts incurred and realized by *other* exporters or producers subject to investigation in respect of production and sales of the *like product* in the domestic market of the country of origin;
- (iii) *any other reasonable method*, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.<sup>148</sup>

In the case, the EC chose the alternative set forth in sub-paragraph (ii).

The heart of India's Article 2:2:2 claim is that the EC did not need to apply the SG&A expenses and profits of Bombay Dyeing to the other Indian respondents, and that having done so, the EC committed three errors. First, the EC could have used the method set forth in the *chapeau*, or in sub-paragraph (i), because the actual amounts of SG&A expenses incurred and profits realized by other Indian company-respondents (at least one in particular) were available.<sup>149</sup> In other words, the EC's first mistake was to resort to sub-paragraph (ii).

Second, even if the EC were justified in resorting to sub-paragraph (ii), then it had misapplied the rule of that provision. The text of the rule calls for the calculation of a weighted average of SG&A expenses, and of profits, associated with the like product sold by other exporters or producers being investigated. The EC had not calculated a weighted average. All it had done was get expense and profit data from one company, Bombay Dyeing. In so doing, it ignored the plural language of the text—namely, the references to “weighted *average*,” “amounts,” and “other exporters or producers.”<sup>150</sup>

The third error, said India, was the EC's reliance data on SG&A expenses and profits only from productions and sales transactions in the ordinary course of trade, rather than from all transactions. The EC excluded from the calculation of a weighted average for SG&A expenses and profits any data from a sales transaction made at

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148. AD Agreement art. 2:2:2(i)-(iii), *reprinted in* HANDBOOK, *supra* note 10, at 394 (emphasis added).

149. *See Bed Linen* Panel Report, *supra* note 125, ¶¶ 6.50, 6.64.

150. *See* AD Agreement art. 2:2:2(ii), *reprinted in* HANDBOOK, *supra* note 10, at 394. (emphasis added).

below cost of production. The EC thought these below-cost sales to be (obviously) unprofitable and unrepresentative. Precisely because these sales were unprofitable is why any petitioner in an AD case would want them included. Their inclusion would lower CV, and thus lower (or perhaps even eliminate) any dumping margin. Accordingly, India turned to the text of the AD Agreement, seeking to have profits (that is, losses) from sales of bed linen in India that were not made in the ordinary course included in the computation of CV.

India argued that the first alternative, set forth in the *chapeau* to Article 2:2:2 of the AD Agreement, calls for actual SG&A expense and profit data “pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.”<sup>151</sup> In contrast, sub-paragraph (ii) does not restrict the data source to ordinary course sales. Rather, it contemplates gathering data on expenses and profits from all transactions. As the two alternatives are mutually exclusive, it is incorrect to transfer the limitation of ordinary course sales from the *chapeau* to sub-paragraph (ii).

Underlying India’s claim of error committed by the EC was a particular, but by no means peculiar, interpretation of the language of Article 2:2:2. To India, the three alternatives were to be thought of as listed in descending order of preference—a “gradually declining scale in the order of options as far as the relation with the producer is concerned.”<sup>152</sup> What was the reason for this descent of preferences, *i.e.*, for according top preference to the first alternative, actual producer-specific data? The second and third alternatives—applying data from one company to other companies, or using another reasonable method—would deprive a respondent of verifying the calculation of its own dumping margin. If another company’s SG&A expenses and profits were used to compute CV for a respondent and thereby the dumping margin (the difference between CV and Export Price), then how could that respondent double-check the margin against its own data? Worse yet, the respondent would not even know if it had been dumping in the first place. Whatever margin it calculated for itself, based on its own SG&A expenses and profits, would not matter because another company’s SG&A expenses and profits were what mattered. In brief, fairness to the respondent was the reason India said sub-paragraphs (i), (ii), and (iii) ought to be read as a downward scale.

Likewise, how could the use of SG&A expenses and profits from Bombay Dyeing in the calculation of CV for all other Indian respondents be fair? The data from one producer might be idiosyncratic, “coloured by factors unique to the single producer whose SG&A and profit amounts were used, thereby artificially finding dumping for all producers, where, in reality, none exists for most.”<sup>153</sup> As for Bombay Dyeing, India called it “a wholly atypical company in India,” and thus “the SG&A [expenses] and profit from one peculiar and extraordinary company cannot be

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151. *See id.*

152. *See Bed Linen Panel Report, supra* note 125, ¶ 6.49.

153. *See id.* ¶ 6.64.

considered ‘reasonable.’”<sup>154</sup>

The EC offered three point-by-point rebuttals to India’s interpretation of the language of Article 2:2:2 of the AD Agreement. First, nothing in the language of Article 2:2:2, especially in sub-paragraphs (i) and (ii), indicated an order of preference. At best, the word “any other” in sub-paragraph (iii) suggested that it was an alternative to the first two sub-paragraphs. But, as between sub-paragraph (i) and (ii), it was not clear from the text whether any preference was to be accorded to the first of these. Thus, it is up to each WTO Member to decide whether, or how, to prioritize between (i) and (ii).

Indeed, said the EC, there is good reason to believe that no *a priori* preference should be given to sub-paragraph (i) over (ii). The key difference between the two paragraphs was the identity of the company from which SG&A expense and profit data were taken. In sub-paragraph (i), it was data specific to a particular producer. In sub-paragraph (ii), it was data from other producers. But, what is as important as the identity of the respondents is the particular product being investigated. Indeed, it is critical that data from the same type of products are used. Sub-paragraphs (i) and (ii) speak of the same subject merchandise, and as long as data pertains to that, then the exact producer is less significant. Moreover, it may be significantly less time-consuming to focus on product-specific, rather than producer-specific, data. India frets about only one kind of unfairness, namely, that to a respondent stuck with SG&A expense and profit figures in the calculation of CV from another company. What about unfairness from delays and inconvenience associated with an investigation into expense and profit figures of every single exporter and producer?

Second, as for the calculation of a weighted average on the basis of just one data point—Bombay Dyeing—the EC thought nothing of it. To the EC, the plain meaning of the word “average” admitted the possibility of an average comprised of one item. And, references to the plural—the words “amounts” and “other exporters or producers”—did not exclude the singular of those items. Often in ordinary speech and carefully drafted legal texts, said the EC, a plural term is used to encompass instances of one item and of more than one item.

Third, regarding the restriction of data on SG&A expenses and profits to ordinary course sales, the EC said this made perfect sense. The data it excluded was from non-ordinary course transactions, which were unrepresentative or unprofitable since they were below-cost sales. Surely, India did not want CV to be based on such transactions. That would cause CV itself to be unreliable. The EC did not go so far as to say that the text of Article 2:2:2(ii) mandated the exclusion of below-cost sales. It only argued that it had the discretion to do so. After all, in calculations of Normal Value, where no proxy is used, below-cost sales typically are excluded on the grounds that they are outside the ordinary course of trade and would, therefore, distort the calculation.

The Panel held against India on its Article 2:2:2 claim.<sup>155</sup> Essentially, the Panel

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154. *See id.* ¶ 6.64.

155. *Id.* ¶¶ 6.59-6.62.

agreed with each of the EC's rebuttals. First, said the Panel, a careful reading of the provision indicated no preference for the methodology of one sub-paragraph over another. No hierarchy among the options could be inferred from the sequencing because a sequence is an inherent characteristic of any list. Had the drafters wanted to express a preference, they would have done so expressly, as they did in other parts of the AD Agreement and Uruguay Round agreements. The simple fact, said the Panel, is that the alternatives for ascertaining SG&A expenses and profits in sub-paragraphs (i), (ii), and (iii) are imperfect substitutes for the aim set forth in the *chapeau* of getting producer-specific data on the like product. Sub-paragraph (i) relaxes the reference to the like product (allowing for data from the same general class of products). Sub-paragraph (ii) relaxes the reference to the particular producer (allowing for data from other producers). Sub-paragraph (iii) relaxes both needs, product-specific and producer-specific data.

Second, as for use of sub-paragraph (ii) when only one other producer or exporter was available from which to obtain SG&A expense and profit data, the Panel ruled that was fine.<sup>156</sup> The whole point of calculating a weighted average was to ensure that if data from more than one exporter or producer were available, then the data from all these companies were included in the calculation, or that no discriminatory exclusions were made. But, when only one exporter or producer is available, the prospect of discrimination does not arise. The existence of data from more than one respondent was not a necessary prerequisite for the use of sub-paragraph (ii).

What about India's contention that SG&A expense and profit data were available from at least one other respondent? The Panel said that India was factually incorrect. That respondent was not in the principal sample used by the EC for calculating the dumping margin, but rather, in the EC's "reserve sample"—the category for companies that had not cooperated or provided usable information.<sup>157</sup>

Third, said the Panel, the EC was correct about its discretion to exclude below-cost sales from a calculation of weighted averages for SG&A expenses and profits.<sup>158</sup> To be sure, the text did not mandate the exclusion. But, keeping them out from CV was logical enough, given that they usually are excluded from Normal Value. If below-cost sales were included, then CV would be artificially low because these sales are unprofitable. In turn, the dumping margin would be artificially depressed.

Unfortunately for the EC, its victory on the Article 2:2:2 points proved to be a short-lived one. As explained below, the Appellate Body reversed the Panel on that holding, thereby handing India a second key victory.

##### 5. Principal Issues on Appeal<sup>159</sup>

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156. *Id.* ¶¶ 6.70-6.75.

157. *See id.* ¶ 6.74.

158. *See Bed Linen* Panel Report, *supra* note 125, ¶¶ 6.83-87.

159. *See Bed Linen* Appellate Body Report, *supra* note 134, ¶ 45.

The appeal centered on two matters: zeroing and the calculation of CV, raised by the EC and India, respectively. On zeroing, the EC raised one, straightforward question: was its zeroing methodology consistent with Article 2:4:2 of the AD Agreement? On CV, India asked two questions. First, under Article 2:2:2(ii) of the AD Agreement, if data existed on SG&A expenses and profits for only one exporter or producer (in the case, Bombay Dyeing), may that data be used for all the other respondents too? Second, also under Article 2:2:2(ii), in determining profits when calculating CV, is it permissible to exclude sales by other exporters and producers that are not made in the ordinary course of trade?

### 6. Holdings and Rationale<sup>160</sup>

On appeal, the EC defended its practice of zeroing as being consistent with Article 2:4:2 of the AD Agreement. It argued that this provision demands two steps in the calculation of a dumping margin in any AD case in which the subject merchandise consists of various types of products that are not comparable. First, said the EC, it is necessary to calculate a weighted average of prices from comparable export transactions (not from all export transactions). The critical aspect of this step, said the EC, was the subdivision of subject merchandise into comparable models and the calculation of a dumping margin for each model. Second, an overall weighted average margin—one that encompassed all the models—had to be calculated. In this area, the EC said Article 2:4:2 was silent. It was up to each WTO Member to decide how to go about that second-stage of the methodology, including whether to deem as zero any negative dumping margin.

The EC's defense hinged tightly on the use of the word "comparable" in Article 2:4:2 of the AD Agreement. The provision speaks of "comparison of a weighted average normal value with a weighed average of prices of all *comparable* export transactions. . . ."<sup>161</sup> However, the Appellate Body would have none of it. The Appellate Body held that zeroing was entirely inconsistent with this provision.

"As always," said the Appellate Body, the starting point for its analysis was the relevant text.<sup>162</sup> Nothing in that text, Article 2:4:2, or any other provision of the AD Agreement, remotely suggests a two-stage process for calculating a dumping margin.

160. This discussion is drawn from *id.* ¶¶ 49-62, 67-85. In addition to the points mentioned above, the EC raised a claim that the Panel rendered an impermissible interpretation of Article 2:4:2 of the AD Agreement. As a result, urged the EC, the Panel violated the standard of review set forth in Article 17:6(ii) of the agreement (which calls for interpretation in accordance with customary international law on interpretation, and deference to a WTO Member in the event there is more than one permissible interpretation). The Appellate Body rejected this claim. *See id.* ¶¶ 63-66.

161. AD Agreement art. 2:4:2, *reprinted in* HANDBOOK, *supra* note 10, at 394 (emphasis added).

162. *Bed Linen* Appellate Body Report, *supra* note 134, ¶ 50.

Moreover, Article 2:4:2 has to be read in light of the basic definition of dumping set forth in Article 2:1: “a *product* is to be considered as being dumped, *i.e.*, introduced into the commerce of another country at less than its normal value, if the export price of the *product* exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.”<sup>163</sup> Clearly from the text, a dumping margin is determined on a product-by-product basis, and there is no mandate to subdivide a product under investigation (the subject merchandise) into different types or models. In fact, when it did so, the EC behaved hypocritically.

By the EC’s own admission, there was one product at issue— “*bed linen of cotton-type fibres*.”<sup>164</sup> This product encompassed pure cotton bed linen and bed linen made of mixed cotton and man-made fiber. It also included bed linen that was bleached, dyed, or printed. And, significantly, the EC’s definition of the subject merchandise included bed sheets, duvet covers and pillow cases, whether packaged as a set or sold separately. In other words, the EC had defined broadly for its AD investigation the “product” at issue. The EC even proclaimed that “[n]otwithstanding the *different possible product types* due to different weaving construction, finish of the fabric, presentation and size, packing, etc., *all of them constitute a single product for the purpose of this proceeding* because they have the same physical characteristics and essentially the same use.”<sup>165</sup> Its decision, subsequently, to divide this single product into different types and to calculate a dumping margin for each type was incongruous with its initial proclamation: either the products were comparable, in which case they could be grouped together for a single dumping margin calculation, or they were incomparable. The EC could not have it both ways.

The EC also acted unfairly when it set to zero any negative dumping margins. The plain language of the text of the AD Agreement—from which the Appellate Body never departed—was evident. Article 2:4:2 called for a comparison of a weighted average Normal Value with a weighted average Export Price derived from “*all comparable export transactions*.”<sup>166</sup> Whereas the EC had stressed the word “comparable,” the Appellate Body laid emphasis on the word “all.”<sup>167</sup> By excluding the negative dumping margins, the EC did not establish an overall dumping margin on the basis of “all” comparable transactions—and they were comparable, because (again, by the EC’s admission), they were one product. That exclusion, in turn, was unfair. Article 2:4 of the AD Agreement, which is expressly referenced in the first

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163. AD Agreement art. 2:1, *reprinted in HANDBOOK*, *supra* note 10, at 392 (emphasis added).

164. Commission Regulation (EC) No. 1069/97 of 12 June 1997 imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, Official Journal, No. L. 156, 13 June 1997, n.3, ¶ 10, *quoted in Bed Linen Appellate Body Report*, *supra* note 134, ¶ 52 (emphasis added by the Appellate Body).

165. Commission Regulation, *supra* note 164 (emphasis added by the Appellate Body); *see also Bed Linen Appellate Body Report*, *supra* note 134, ¶ 57.

166. AD Agreement art. 2:4:2, *reprinted in HANDBOOK*, *supra* note 10, at 395.

167. *See Bed Linen Appellate Body Report*, *supra* note 134, ¶¶ 55-56.



sentence of Article 2:4:2, calls for a “fair comparison” of Normal Value and Export Price.<sup>168</sup> How, opined the Appellate Body, could the EC’s methodology be judged “fair” when it obviously caused the dumping margin to be inflated?

On the second major issue raised on appeal, the computation of SG&A expenses and profits for inclusion in CV, the Appellate Body was reasonably brief in its remarks. The Panel had held that the methodology of Article 2:2:2(ii) of the AD Agreement (concerning a weighted average of the actual amounts of SG&A expenses incurred and profits realized by other exporters or producers) could be applied when there are data on SG&A expenses and profits for only one other producer or exporter. It also had held that this provision allowed for the exclusion of sales outside of the ordinary course of trade in the respondent’s home market (here, India) when determining the profit amount to be included in computing CV. The Appellate Body disagreed on both counts, overturned the Panel’s conclusions, and thus found in favor of India.

Regarding SG&A expenses and profits, the Appellate Body found that the Panel’s holding bespoke its poor understanding of the English language. The Appellate Body trotted out one of its favorite weapons—an edition of the *Oxford English Dictionary*.<sup>169</sup> It pointed out that the lexicographic understanding of “weighted average” means a calculation based on more than one item. A weighted average of just one producer or exporter is, by definition, not a weighted average. Therefore, said the Appellate Body, the phrase in Article 2:2:2(ii) of the AD Agreement concerning “other exporters or producers,” which is used in the same breath as the term “weighted average,” cannot possibly refer to a situation of a lone company. Interestingly, the EC appears to have surrendered on this point at the oral argument before the Appellate Body.<sup>170</sup>

As for excluding from the calculation of a weighted average for SG&A expenses and profits any sale in the exporter’s home market (here, India) not made in the ordinary course of trade, the Appellate Body, not surprisingly, looked at the plain meaning of the relevant text. The Appellate Body stressed that Article 2:2:2(ii) of the AD Agreement employs the phrase “the weighted average of *the actual amounts incurred and realized* by other exporters or producers.”<sup>171</sup> Is there any basis for excluding some amounts, while including others? Clearly not, said the Appellate Body. Is there any distinction between SG&A expenses incurred and profits realized on production and sales in the ordinary course versus production and sales not in the ordinary course? Again, clearly not. Thus, concluded the Appellate Body, a WTO Member is not allowed to exclude sales outside of the ordinary course from the calculation of a weighted average of SG&A expenses and profits when computing CV.

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168. AD Agreement art. 2:4, *reprinted in* HANDBOOK, *supra* note 10, at 394.

169. *See Bed Linen* Appellate Body Report, *supra* note 134, ¶ 74 n.41.

170. *Id.* ¶ 74.

171. *See* AD Agreement art. 2:2:2(ii), *quoted in Bed Linen* Appellate Body Report, *supra* note 134, ¶ 80 (emphasis added by Appellate Body).

Lest there be any doubt about this conclusion, reasoned the Appellate Body, consider the clear contrast of the *chapeau* of Article 2:2:2. The *chapeau* sets out the principal method for calculating SG&A expenses and profits: use “*actual data pertaining to production and sales in the ordinary course of trade* of the like product by the exporter or producer under investigation.”<sup>172</sup> Sub-paragraph (ii) omits any reference to ordinary course sales; hence, sales not in the ordinary course are to be included, and the Appellate Body cannot presume the omission was an accident committed by the drafters of the AD Agreement, or that the drafters intended for the Appellate Body to imply a distinction between sales in and outside of the ordinary course. To hold otherwise would be to run afoul of a guiding principle of much of Appellate Body jurisprudence—Article 31 of the *Vienna Convention on the Law of Treaties*,<sup>173</sup> which calls for a careful examination of the words of a treaty in order to determine the intentions of the parties.<sup>174</sup>

### **Commentary:**

#### **1. An Over-Argued Case**

It is abundantly clear that India is playing an increasingly prominent role in WTO affairs. Among the signs of its activist multilateral trade policy is its leadership of a large bloc of developing countries in formulating a negotiating position for the Fourth WTO Ministerial Conference, held in Doha, Qatar, from November 9-13, 2001. India’s voice on issues such as implementation of the Uruguay Round agreements, compulsory licensing of intellectual property, and increased access for textiles products from developing countries to developed country markets was loud and clearly heard by the senior-most trade officials in Washington, D.C. and Brussels.

Not surprisingly, then, India is in the position of being somewhat of a role model for many developing countries in WTO adjudication. Other developing countries can look to India’s example on matters such as the accumulation of technical legal capacity (*i.e.*, human capital in trade law), the kinds of cases India brings pursuant to the DSU, and how India argues and defends cases. Conversely, the challenge for India is not to become an “anti-role model.”

One way to be a negative example is to over-argue cases. Not every claim that can be raised should be raised. Each potential claim needs to be assessed by a prospective claimant, before the brief-writing begins, to see whether the precious time and resources of the WTO ought to be consumed with the claim. Put bluntly, WTO adjudication is not about a developing country poking its finger as many times as possible in the eyes of developed countries. It is about the international rule of law in

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172. See AD Agreement art. 2:2:2, *quoted in Bed Linen Appellate Body Report, supra* note 134, ¶¶ 81-82 (emphasis added by Appellate Body).

173. See Vienna Convention, *supra* note 58.

174. See *Bed Linen Appellate Body Report, supra* note 134, ¶ 83.

trade and developing a jurisprudence in this specialty that is both efficient and just.

Did India bring too many claims against the EC in the *Bed Linen* case? Ought it to have focused on the problem of zeroing? In retrospect, and judging from India's lack of success on virtually all of its contentions, the answer is "yes." Certainly, there is nothing wrong with testing the law, particularly in a GATT-WTO regime, in which many legal points remain uncertain and all there is to go on is an ambiguous provision in a Uruguay Round agreement. Still, to continue as a role model, India shall have to learn as much from its claims that failed as from the one that worked.

Strangely, there is one aspect of the zeroing issue that India failed to pursue—meaning that perhaps on that particular claim, it under-argued the case. The EC did not (or so India asserted) always apply the zeroing methodology. In some past cases, the EC had allowed negative dumping margins to offset positive margins. If true, then India had a strong discrimination charge under GATT Article III:4. However, India did not make a claim of discriminatory treatment, and it is not clear why.<sup>175</sup> Perhaps it wanted to attack the zeroing methodology, and not risk a ruling in favor of the non-discriminatory application of that methodology. If so, then India could have pled in the alternative, in effect saying that "zeroing is illegal, but if it is not, then it must be administered in a non-discriminatory manner."

## 2. Kudos to India

While India might have made more claims than it needed have, it came to grips with some of the most complicated rules in all of international trade law. Let no one say that a developing country cannot argue technical AD cases against developed countries and win. India's performance in the *Bed Linen* case stands as a model to all Third World countries that they, too, can develop their trade law capacity to a level that is competitive with the First World.

On each of the key issues, the argumentation is sophisticated and symmetrical. The Indian side offers a claim and backs it up with sound reasoning. The EC counters each claim with a rebuttal that, at the very least, gives the objective observer reason to pause. The two sides go at it, head-to-head, charging and counter-charging. Neither side is intimidated by the other. Each has a technical mastery of the material and fluency in the complex facts and law at play.

So what? Why spotlight what ought to be routine—good lawyering? The answer is that it is anything but routine, especially among developing countries, at this early stage in their participation in the WTO. Consider two points. First, counter the critics of globalization, who say it is unfair to LDCs because they cannot compete.

Second, give the LDCs the confidence they need to use the system to protect their interests.

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175. See *Bed Linen* Panel Report, *supra* note 125, ¶ 6.103 n.45.

### 3. Shame on the EC

As discussed above, the Appellate Body exposed the hypocrisy of the EC's argument that bed linens were a single product, but different dumping margins had to be calculated, and zeroing had to be used for different product types. The EC ought to have anticipated the Appellate Body would respond with stern words like:

Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". . . .

. . . .

[W]e fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.<sup>176</sup>

Worse yet, the EC ought to have realized that the Appellate Body would lecture, as it did, that the AD Agreement offered a way to account for differences in the physical characteristics of merchandise subject to investigation.<sup>177</sup>

Article 2:4 of the AD Agreement requires that "[d]ue allowance" be made in the dumping margin calculation for differences that affect the price comparability of Normal Value and Export Price, including differences in physical characteristics.<sup>178</sup> This jiggling of a dumping margin calculation is called a "DIFMER" adjustment, and it is made to Normal Value. If (1) the subject merchandise (the sale prices of which generate Export Price) sold in the importing country (in the case, the EC) differs physically in some way from the foreign like product (the sale prices which generate Normal Value) sold in the exporter's home country (in the case, India), and (2) the physical differences would render a comparison between Normal Value and Export Price unfair, then some adjustment has to be made to Normal Value. That is, Normal Value must be increased, or decreased, in a way that takes account of the physical differences of the foreign like product that render it more, or less, valuable, respectively, from the subject merchandise.<sup>179</sup>

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176. *Bed Linen* Appellate Body Report, *supra* note 134, ¶¶ 58, 60.

177. *See id.* ¶ 60.

178. AD Agreement art. 2:4, *reprinted in* HANDBOOK, *supra* note 10, at 394.

179. The DIFMER adjustment is set forth in the AD statute of the United States at 19 U.S.C. § 1677b(a)(6)(C)(ii). The statute calls for an increase or decrease in Normal Value by the amount of any difference between Normal Value and Export Price (or Constructed Export Price) that is wholly or partly due to "the fact that merchandise described in subparagraph (B)

Thus, if the EC had been sincere in its concern about product types, then it would have entertained the possibility of a DIFMER adjustment. It would have inquired into the product characteristics of cotton-type bed linen sold in India and compared and contrasted them carefully with those sold in the EC. Had the EC found physical distinctions that affected the comparability of prices in the Indian and European markets, then it would have done a DIFMER adjustment to Normal Value. The Appellate Body very nearly seemed to be saying that the EC ought to be ashamed for failing to consider more thoughtfully the technical rules set forth in the AD Agreement on dumping margin adjustments. After all, India—a developing country—seemed to have mastered the relevant technical rules.

#### 4. India's Successful Special and Differential Treatment Claim

One of the potentially important, but little discussed, implications of the *Bed Linen* case is the Panel's ruling on a claim raised by India under Article 15 of the AD Agreement. This provision concerns special and differential ("S&D") treatment in AD cases. It states:

*[S]pecial regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing*

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or (C) of section 771(16) [19 U.S.C. 1677(16)] is used in determining normal value...." 19 U.S.C. § 1677b(a)((6)(C)(ii). In turn, subparagraphs (B) and (C) of Section 1677(16), which contains the definition of "foreign like product," describe a foreign like product that is not identical in physical characteristics to the subject merchandise. Rather, the foreign like product is:

- (1) according to subparagraph (B), produced in the same country, and by the same person, as the subject merchandise, like the subject merchandise in components and use, and of approximately equal commercial value as the subject merchandise, or
- (2) according to subparagraph (C), produced in the same country, and by the same person, as the same general class or kind as the subject merchandise, like the subject merchandise in terms of use, and (according to the Department of Commerce) is reasonably comparable with the subject merchandise. *Id.*

The technical statutory language essentially means that if the foreign like product is not identical with the subject merchandise, then a DIFMER adjustment to Normal Value may have to be made. That adjustment will remove any price discrepancy between Normal Value and Export Price (or Constructed Export Price) that arises because of the physical differences between the subject merchandise and not-exactly-identical foreign like product.

country Members.<sup>180</sup>

The highlighted language in the text bespeaks the ambiguity of this S&D treatment. What kind of regard would be “special”? Would slashing the size of an AD duty by, say 50 percent, do the trick? What exactly is the “special situation” of developing countries anyway with respect to AD cases? Is it their poverty *per se*, their lesser resources to fight AD cases in Geneva? What types of remedies would be “constructive?” Perhaps some sort of managed trade arrangement? And, what interests of a developing country would be “essential?” Would it be a sector that accounts for a sizeable portion of that country’s economy?

Until the *Bed Linen* case, no WTO panel had provided guidance to these questions under Article 15 of the AD Agreement.<sup>181</sup> Indeed, the whole area of S&D treatment had been pretty well left unoccupied by the trade judges in Geneva; hence, developing country Members of the WTO felt that the S&D rules in the Uruguay Round texts were empty promises, or rights without remedies. India’s aggressive argumentation in the *Bed Linen* forced a modest change in this legal *status quo*.

India contended that the EC failed to consider the special situation of India as a developing country. Specifically, India had told the EU it was willing to discuss a constructive remedy, such as a voluntary agreement by Indian exporters and producers to revise their prices. The EU ignored India’s offer to negotiate. The EU felt that any such accord would be unenforceable, because of the large number of Indian companies exporting bed linen to Europe.<sup>182</sup> Was the EU really serious, or was it saying, in a subtle way, that it simply could not trust most Indian companies to keep to a voluntary price deal?

Whatever the answer, the Panel handed India something of a victory. The Panel agreed with India that the EC had not accorded India S&D treatment, in that the EC had not explored alternative, constructive remedies, short of an AD action, before imposing AD duties.<sup>183</sup> Consequently, the Panel gave WTO Members a hint of what would constitute a “constructive remedy” (namely, a voluntary accord to raise prices) and what would not be “special regard” (namely, utterly ignoring an overture from a developing country). However, the Panel’s finding was not raised on appeal. Hence, there is a very long road to develop the jurisprudence of Article 15.

##### 5. The Need for the Appellate Body, and Another De Facto Precedent

For those international trade law scholars and practitioners who continue to insist

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180. AD Agreement art. 15, reprinted in HANDBOOK, *supra* note 10, at 412.

181. See Daniel Pruzin, *WTO Rules Against EU Dumping Duties on Indian Bed Linens, “Zeroing” Method*, 17 Int’l Trade Rep. (BNA) 1348 (Sept. 7, 2000) [hereinafter Pruzin, *WTO Rules Against EU Dumping Duties*].

182. See Pruzin, *EU Official Downplays Impact*, *supra* note 135.

183. See Pruzin, *WTO Rules Against EU Dumping Duties*, *supra* note 181.

that WTO adjudication is mere arbitration between the complainant and respondent Members, and that the Appellate Body is not a judicial organ, the *Bed Linen* case cannot be enjoyable reading. At an abstract level, the case stands as yet another example of the necessity for the judges of Geneva to step in and engage in interstitial law-making. Articles 2:2:2 and 2:4:2 of the AD Agreement were not entirely clear on SG&A expenses and profits and on zeroing. India offered an interpretation. The EC offered a counter-interpretation. There was no time to wait for the Ministerial Conference to meet in Doha, Qatar to sort matters out, and in any event, these sorts of details are hardly the stuff for grand debate among trade ministers. What other WTO body was going to handle the issues but the Appellate Body?

The Appellate Body understood as much. The language of some of its holdings is cast in fairly broad terms, in that the addressees are not just the parties, but the WTO membership at large. For example, on the question of excluding sales not in the ordinary course from the weighted average of SG&A expenses and profits under Article 2:2:2(ii), the Appellate Body refers to what a “Member” may or may not do.<sup>184</sup> Indian trade lawyers understood the impact of the ruling and hailed it as a “precedent that would affect the EU’s use of anti-dumping measures in the future.”<sup>185</sup> At least one EU trade lawyer acknowledged that it was a “landmark” ruling.<sup>186</sup>

Surely it would affect more than the EU’s interpretation and application of AD law. As one prominent international trade lawyer pointed out:

This decision has a broad application. It tells you how the appellate body will rule in these matters. I suspect it will lead to WTO cases being brought against the U.S.<sup>187</sup>

After all, is it scarcely imaginable that other WTO Members will start up, or continue, zeroing when computing dumping margins? Would they seriously entertain a reading of the sub-paragraphs on SG&A and profit expenses that put the choices embodied therein as neutral? Surely not. What the Appellate Body has done, once again, is set a *de facto* precedent to which all WTO Members shall have to pay heed. Luckily for India, the EC did just that. On April 26, 2001, it revoked its AD duties on Indian bed linen and set a time for implementation of the Appellate Body’s recommendations.<sup>188</sup>

184. See *Bed Linen* Appellate Body Report, *supra* note 134, at ¶¶ 80, 84.

185. Guy de Jonquieres, *Europe Breaks WTO Rules on Anti-dumping*, FIN. TIMES, Mar. 2, 2001, at 4.

186. Pruzin, *WTO Appellate Body*, *supra* note 138 (quoting an unnamed Brussels-based attorney); see also Daniel Pruzin, *EU Agrees to Revoke Antidumping Duties on Indian Bed Linen Exports in WTO Case*, 18 Int’l Trade Rep. (BNA), at 711 (May 3, 2001) (stating some legal experts called the decision “an important precedent”).

187. Jonquieres, *Brakes*, *supra* note 136 (quoting David Palmeter of Powell Goldstein, Washington, D.C.). To be sure, given that developing countries are prosecuting an increasing number of alleged dumping cases, some of them may be reluctant to use this precedent for fear it could be turned on them by developed countries. See *id.*

188. See *EU Agrees to Revoke*, *supra* note 186; *EU Suspends Dumping Duties on Indian*

## **B. Determining Injury: The Thailand Steel Case**

### ***Citation:***

***Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*** (complaint by Poland, WT/DS122/AB/R).

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 5 April 2001.

### ***Explanation:***

#### **1. Facts and Panel Holdings**<sup>189</sup>

On December 27, 1996, Thailand imposed provisional AD duties on steel products from Poland, specifically, so-called “H beams” made of iron or non-alloy steel. Thailand assessed the final AD duty, equal to 27.78 percent of the cost, insurance, and freight (“CIF”) value, of these products on May 26, 1997. The duty applied to subject merchandise exported or produced by any Polish company. The AD case arose in the first place as a result of a petition filed on June 21, 1996 by the sole Thai producer of H-beams, Siam Yamato Steel Company (“Siam Steel”), with the Thai Ministry of Commerce. There were two respondent Polish companies: Huta Katowice (the only Polish producer of H-beams and an exporter of them) and Stalexport (an exporter of H-beams).

Poland was unsuccessful in arguing to a WTO Panel that Thailand’s calculation of Normal Value, specifically, the amount for profit, breached Article VI of GATT and Article 2:2 and 2:2:2(i) of the AD Agreement. Poland agreed that its home market for the like product (a certain type of H-beam) was not viable, in that it accounted for less than five percent of Polish sales to Thailand. In turn, Poland did not contest Thailand’s use of CV as a proxy for Normal Value. However, Poland argued that the Thai administering agency included in the computation of CV an amount for profit—36.3 percent, based on profits earned by Huta Katowice on its sales of all H-beams—that was too high. Poland argued that there were several other, and far lower, profit figures that Thailand could and should have used, which

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*Bed Linen to Comply with WTO*, 18 Int’l Trade Rep. (BNA), at 1330 (Aug. 23, 2001).

189. This discussion of the Facts is based on World Trade Organization, *Overview of the State-of-Play of WTO Disputes* 23-24 (July 13, 2001), available at <http://www.wto.org>, Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ¶¶ 2.1-11, 7.95-129, 7.173-181, 7.193, 7.199, 7.202, 7.209-215, 7.216-221, 7.224-284, 8.3-4 (Apr. 5, 2001) [hereinafter *Thailand Steel Panel Report*].



obviously would have narrowed the dumping margin considerably. By failing to do so, Poland argued, the Thais breached Article 2:2 and 2:2:2(i): their calculation was unreasonable, and their definition of the “same general category of products” was too narrow (it included only H-beams, not all products of the same general category). Moreover, said Poland, Thailand was obligated to perform a test to ensure that its calculation of profits for inclusion in CV was reasonable. In brief, Poland was saying that a reasonable calculation would have included profit figures from a broad array of steel products in the same general category of products as H-beams, resulting in a reduced dumping margin, and that a separate test for the reasonableness of a calculation under Article 2:2:2 was required.

Not so, held the Panel. The Panel rejected Poland’s arguments under Article 2:2 and 2:2:2(i) of the AD Agreement, and Poland did not appeal. Thus, in contrast to the *Bed Linen* case, the *Thailand Steel* case does not yield an Appellate Body ruling on the calculation of the dumping margin. Instead, *Thailand Steel* is all about the other phase of an AD investigation, namely, the determination of injury.

On injury, Poland complained to the WTO Panel that Thailand had violated Article 3 of the AD agreement, in particular, Article 3:1, 3:2, 3:4, and 3:5. These provisions state:

- 3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on *positive evidence* and involve an *objective examination* of both (a) the volume of the dumped imports and the *effect of the dumped imports on prices in the domestic market for like products*, and (b) the consequent impact of these imports on domestic producers of such products.
- 3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. *With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.* No one or several of these factors can necessarily give decisive guidance.
- 3.4 The examination of the impact of the dumped imports on the domestic industry concerned *shall include* an evaluation of *all relevant economic factors* and indices having a bearing on the state of the industry, *including* actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment,

wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

- 3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, *causing injury* within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of *all relevant evidence* before the authorities. *The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.* Factors which *may* be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.<sup>190</sup>

The structure of the above-quoted provision suggests a relationship between the latter sub-paragraphs and the first subparagraph. Article 3:1 sets forth a general criterion under GATT Article VI for any injury determination in an AD case—that the determination be based on “positive evidence and involve an objective examination” of three factors: (1) the volume of dumped imports; (2) the effect of dumped imports on prices in the importing country of like products; and (3) the impact of dumped imports on producers of like products in the importing country. This general criterion is then elaborated upon in the subsequent provisions. Article 3:2 deals with the first two factors (volume and prices), and Article 3:4 deals with the third factor (impact). Article 3:5 treats the conceptually and practically important matter of causation.

Poland claimed that Thailand had violated Article 3:1 of the AD Agreement, in that Thailand had failed to make its material injury determination on the basis of an “objective examination” of “positive evidence.” In other words, the evaluation was neither unbiased nor objective. The Panel agreed. Why?

Poland linked Article 3:1 to the provisions that followed it, examined their requirements, and applied their mandates to the realities of the Thai injury investigation. With respect to Article 3:1 and the second sentence of Article 3:2, Poland said that Thailand did not consider the effect of dumped imports (*i.e.*, the Polish H-beams imported into Thailand) on prices of the like domestic product (*i.e.*, Thai H-beams).<sup>191</sup> That is, Poland contested Thailand’s conclusion that prices of

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190. AD Agreement arts. 3:1-2, 3:4-5, *reprinted in* HANDBOOK, *supra* note 10, at 396 (emphasis added).

191. Poland also lodged a claim about Article 3:1 and the first sentence of Article 3:2 of the AD Agreement. Poland said that Thailand had failed to consider whether there was a

Polish H-beams and Siam Steel's H-beams moved in the same downward direction (*i.e.*, price depression), and that Siam Steel had to lower its prices to match those of the Polish competition. Poland also disputed the logic Thailand used to support this finding, namely, that underselling and consequent price depression or suppression caused by Polish H-beams was confirmed by the fact that Siam Steel sold H-beams overseas at higher prices than it sold in Thailand. The Panel held that Thailand had rendered conclusory findings on price undercutting by the subject merchandise and on the effect of this merchandise on the depression of prices and the prevention of price increases. The Panel faulted the Thais for failing to produce facts to support these findings. Worse yet, intoned the Panel, some of the data Thailand used contained errors.

Regarding Articles 3:1 and 3:4 of the AD Agreement, Poland made the overarching argument that all of the factors listed in the latter provision must be considered in all cases. Otherwise, the injury investigation neither would be on the basis of positive evidence, nor would it be an objective examination pursuant to Article 3:1. Reading the provisions this way, Poland made three carefully delineated charges. First, Thailand failed to take into account certain factors specified in Article 3:4 when considering the effect of dumped Polish H-beams on the health of Siam Steel. The Thai administering authority failed to consider the following factors:

- Actual and potential declines in productivity;
- The magnitude of the dumping margin;
- Actual and potential negative effects on wages;
- Actual and potential negative effects on the ability to raise capital; and
- Actual and potential negative effects on investments.

Second, argued Poland, Thailand did not adequately or appropriately evaluate certain factors, namely:

- Profits and losses;
- Profitability; and
- Cash flow.

Poland addressed these factors only in a conclusory way, with no supporting evidence. Third, Poland accused Thailand of reading some data backwards. That is, with respect to certain factors, the Thais drew the inference of injury, but many factors pointed to a lack of injury. These factors were:

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“significant increase” in the volume of subject merchandise during the period of investigation (1 July 1995 to 30 June 1996). In fact, Poland observed, imports into Thailand of Polish H-beams moved up and down during this period. However, the Panel disagreed, finding in the record evidence to indicate that Thailand did consider the significance of the increase in imports. See *Thailand Steel* Panel Report, *supra* note 189, ¶¶ 7.153-.155, 7.163-.172.

- Domestic production;
- Production capacity;
- Capacity utilization;
- Employment;
- Domestic sales volume;
- Overseas sales volume; and
- Market share.

Put pointedly, the Poles cursed the Thais for an entirely shoddy job at the injury determination.

Of course, Thailand's rebuttal was that the curse was unfair. In fact, the Thai Ministry of Commerce had considered all relevant factors. What was required under Article 3:4 of the AD Agreement was an examination of all of the relevant factors, not all factors. Thailand looked at the relevant factors—particularly the factors affecting domestic prices, *i.e.*, price depression or suppression—and concluded that there was material injury to the Thai H-beam producer. What Poland did not like, said Thailand, was the weight accorded to the various factors. However, the probative value accorded to the relevant factors was for the Ministry of Commerce, not the respondent, to decide.

The Panel sided with Poland on the threshold matter of how to interpret Article 3:4 of the AD Agreement. The Panel said that the list of factors set forth in Article 3:4 is mandatory. All of them must be examined in an injury determination. The plain meaning of the text indicates as much, stating that the administering authority “shall include” in its investigation “an evaluation of all relevant economic factors.”<sup>192</sup> Furthermore, the list of these factors is not exclusive, and the weight to be attached to each of them will vary from one case to the next. But, again, in all cases, each of the individual factors must be evaluated.

As to what the Thai Ministry of Commerce actually had done in its material injury investigation, the Panel agreed with Poland for the most part. True, said the Panel, the Thai Ministry of Commerce had failed to consider three factors:

- The magnitude of the dumping margin;
- The actual and potential negative effects on wages; and
- The actual and potential negative effects on the ability to raise capital or investments.

Moreover, the Panel observed, Poland was right that Thailand had failed to provide an adequate explanation of the factors that it did evaluate. There were positive movements in several of the Article 3:4 injury factors. In particular, the capacity of the Thai producer of H-beams remained constant, and trends in production, capacity utilization, domestic sales, export sales, market share, inventories, and employment all pointed to a healthy domestic industry.

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192. AD Agreement art. 3:4, *quoted supra* note 190 and accompanying text.

Hence, Thailand's conclusion that material injury occurred as a result of these factors was mystifying. Its explanation for it was utterly unpersuasive. Thailand pointed to the inability of its domestic producer to attain a timely cost recovery, yet that conclusion rested on Thailand's finding of price decreases to match imports from Poland, and (as just discussed) that finding was dubious. Thailand said that Siam Steel had not yet appeared to reach an economy of scale, but hedged on this point, and, in any event, failed to explain how failure to reach an economy of scale could support an affirmative material injury determination. Likewise, in pointing to market share statistics and arguing that the market share of Siam Steel needed to be preserved and expanded, Thailand appeared to bamboozle itself. The Siam Steel's market share increased from 50 to 56 percent.

Finally, as for Articles 3:1 and 3:5 of the AD Agreement, Poland argued that Thailand's determination of a causal relationship between dumped imports and material injury was vitiated by its violations of Articles 3:2 and 3:4. That is, the Thai Ministry of Commerce premised its causation analysis on its findings about the price effects of dumped H-beams from Poland and the effect of such imports on Siam Steel. If these findings were flawed—and they were, said Poland—then they could not possibly support a positive finding of causation.

But, that was not all that was amiss with Thailand's causation analysis, argued Poland. Poland faulted the Ministry of Commerce for failing to consider factors, besides Polish H-beam imports, that may have affected the health of Siam Steel. What were those other factors? Poland alleged that Siam Steel's condition could well have been due to:

- Non-Polish imports;
- The level of demand for steel in the Thai construction industry;
- The highly aggressive way in which Siam Steel entered the H-beam market;
- Siam Steel's productivity and cost structure;
- Technological developments;
- Conditions in the markets to which Siam Steel exports H-beams; or
- A devastating earthquake that had occurred in Kobe, Japan.

Put differently, Poland read Article 3:5 of the AD Agreement in the same way as it had read Article 3:4. Article 3:5 contained a list of economic factors that had to be examined in every causation inquiry, just as Article 3:4 contained a list of variables that had to be studied in every injury determination.

The Panel agreed on Poland's first point—the basis for the purported causal relationship between dumped imports and injury. Thailand had inferred such a relationship from its finding that Polish H-beams undercut Siam Steel's H-beams, leading to price depression or suppression. Yet, that finding was flawed since it was inconsistent with Articles 3:2 and 3:4 of the AD Agreement. Hence, it could not be the basis for an inference of causation. On Poland's second point—consideration of other potential causal factors—Thailand won a small victory.

The Panel faulted Poland on both the facts and law. On the facts, the Panel said

that Thailand indeed had examined certain possible causes of injury, aside from Polish H-beam imports, to Siam Steel. These other factors were:

- World-wide demand for H-beams (including demand in Siam Steel's export markets);
- Consumption patterns (including the general economic environment, and demand in Thailand);
- Potential trade-restrictive practices of, and competition between, domestic and foreign producers;
- The influence of non-Polish imports;
- The nature of Siam Steel's entry into the H-beam market;
- Technological developments; and
- Productivity.

In other words, Poland was just plain wrong in asserting that the Thai Ministry of Commerce had attributed to Polish H-beam imports any injury that might have been caused by other factors.

As to Poland's legal interpretation, the Panel said that Poland had failed to appreciate the linguistic difference between Articles 3:4 and 3:5 of the AD Agreement. The difference is evident from a careful review of the words in each provision. Whereas Article 3:4 contains a mandatory list, *i.e.*, a list of factors that must be examined in every injury determination, Article 3:5 does not. The latter provision mentions factors that may be relevant; the list is illustrative. In other words, Article 3:5 demands that a causation analysis be done and that the analysis include an examination of other known factors that may be contributing to injury. But, Article 3:5 stops short of specifying a list of factors that have to be looked at in the analysis.

Further, observed the Panel, Article 3:5 uses the adjective "known" to modify "factors other than the dumped imports," without clarifying how these factors are known.<sup>193</sup> The ambiguity as to how the other factors become "known" suggests that there is no obligation incumbent on an investigating authority to seek out and examine, on its own initiative, all possible factors other than dumped imports that may be causing injury to the domestic industry seeking AD relief. Rather, the Panel indicated, the authority needs to look at all factors made known to it by the interested parties during the course of the investigation.<sup>194</sup>

Finally, it is worth noting that the Panel also agreed with Poland that Poland had made out a *prima facie* case for nullification or impairment of benefits under Article 3:8 of the DSU. DSU Article 3:8 makes clear that an infringement of an obligation set forth in a covered agreement, such as the AD Agreement (and the other Uruguay Round multilateral trade agreements in goods), is a *prima facie* nullification or

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193. AD Agreement art. 3:5, *quoted supra* note 190, and accompanying text. *See also Thailand Steel Panel Report, supra* note 189, ¶ 7.273 (interpreting "known").

194. *See Thailand Steel Panel Report, supra* note 189, ¶¶ 7.273-7.275, 7.280.

impairment case. In sum, Poland won an impressive victory at the Panel stage.

## 2. Interpretative Issues, Holdings, and Rationale on Appeal<sup>195</sup>

Perhaps surprisingly, Thailand did not seek to overturn the central substantive victory scored by Poland—that the Thai injury investigation was inconsistent with Articles 3:1, 3:2, 3:4, and 3:5 of the AD Agreement. Perhaps authorities in Bangkok were heeding a warning issued in August 1999 by former Thai Deputy Prime Minister and Minister of Commerce, Dr. Supachai Panitchpakdi, the WTO’s Director-General designate. Dr. Supachai called on them to avoid excessive use of Thailand’s new AD law, saying that “[a]uthorities must not allow pressure from the local producers to influence their decision, and the producers must not abuse the law as a trade barrier.”<sup>196</sup>

Accordingly, the Appellate Body left undisturbed the Panel’s finding that Thailand’s injury investigation and determination were inconsistent with these provisions.<sup>197</sup> It recommended that Thailand bring its AD measure against Polish steel into conformity with the these provisions.<sup>198</sup> Of course, Thailand was not entirely happy with the Panel’s Report. It launched its appeal on two principal issues:<sup>199</sup> the use of confidential information and the examination of all relevant

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195. See Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, ¶¶ 79(a), 98-140 (Apr. 5, 2001) [hereinafter *Thailand Steel Appellate Body Report*].

196. Glen Perkinson, *Supachai Warns Thailand’s Producers to Moderate Use of New Antidumping Law*, 16 Int’l Trade Rep. (BNA), at 1439 (Sept. 8, 1999) (quoting Supachai Panitchpakdi).

197. See *Thailand Steel Appellate Body Report*, *supra* note 195, ¶ 139(e).

198. See *id.* ¶ 140. Technically, the Appellate Body aims its recommendation at the Dispute Settlement Body (“DSB”), which—assuming the DSB adopts the Appellate Body’s report—makes recommendations to the losing WTO Member. See, e.g., DSU arts. 2:1 (on powers of the DSB), 3:4 (concerning recommendations of the DSB), 19 (on panel and Appellate Body recommendations), 21:1 (on compliance with recommendations of the DSB).

199. There were four points in total raised by Thailand on appeal. One issue concerned the application by the Panel of the standard of review set forth in Article 17:6 of the AD Agreement. See *Thailand Steel Appellate Body Report*, *supra* note 195, ¶¶ 79(b)(ii), (c)-(d). This issue is not discussed herein. In brief, the Appellate Body found that the Panel did not err in its application of the standard of review (or in its allocation of the burden of proof) under Article 17:6(i) and (ii). See *id.* ¶¶ 121-138, 139(d), (f). However, the Appellate Body corrected the Panel on a technical interpretation of sub-paragraph (i), finding that a panel need not ascertain whether the factual basis of an injury determination is discernible from documents available to the interested parties at the time of the investigation. See *id.* ¶¶ 113-119, 139(c).

A second, and procedural, issue appealed by Thailand that is not treated herein is the Panel’s conclusion that the request initially submitted by Poland concerning claims under Articles 2, 3, and 5 of the AD Agreement was sufficient to meet the requirements of Article

economic factors. These issues raised questions of the interpretation of Articles 3:1 and 3:4, respectively.

Concerning Article 3:1 of the AD Agreement, at the Panel stage, Poland successfully argued for the exclusive reliance by the Panel on non-confidential information in its review of the Thai injury investigation. Essentially, Poland was saying to the Panel that the Panel should not look at, and Thailand should not even submit, confidential information that Thailand had not made available to the petitioner and respondent during the investigation.<sup>200</sup> Poland looked to the terms “positive evidence” and “objective examination” in Article 3:1. Poland fashioned an argument based on these terms to the effect that the Panel could not base its review on confidential reasoning or analysis that may have formed part of the record of the Thai investigation, but to which Polish firms did not have access at the time of the final injury determination.

The Panel agreed and thus declined to predicate its findings on confidential reasoning.<sup>201</sup> To the Panel, the demands of “positive evidence” and “objective examination” meant that the “reasoning” in support of an injury determination had to be “formally or explicitly stated” in the documents in the record of the AD investigation to which interested parties had access. After all, reasoned the Panel, that is how the *Oxford English Dictionary* defined “positive” and “objective.” In other words, the Panel’s lexicographic check indicated it could look only to non-confidential information, namely, information that was made available by the administering authority to the interested parties at the time of the final determination, or information that was discernible from the documents made available to those parties at that time.

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6:2 of the DSU. See *id.* ¶¶ 79(a). Article 6:2, which deals with the sufficiency of a complaint, requires that any request for the establishment of a panel be made in writing, and that the request “identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.” DSU art. 6:2, reprinted in HANDBOOK, *supra* note 10, at 608. Essentially, this provision calls for “notice pleading,” rather than “fact pleading.” The Appellate Body upheld the Panel’s conclusion, stating that notice pleading suffices, and relying in part on its *de facto* precedent set in the *Bananas* case. See *Thailand Steel* Appellate Body Report, *supra* note 195, ¶¶ 79(a), 80-97, 139(a) (adopted 5 April 2001); Bhala, *The Precedent Setters*, *supra* note 78, at 65-67 (discussing *Bananas* case).

Specifically, in *Thailand Steel*, the Appellate Body felt confident Poland met the due process requirement of DSU Article 6:2. Poland provided a brief summary of the legal basis for the complaint so as to give Thailand knowledge of the case it had to answer, and of the violations Poland was alleging, so that Thailand could begin preparing a defense. In Poland’s request for the establishment of a panel, Poland went beyond a mere listing of items. Poland cited to Articles 2, 3, and 5 of the AD Agreement, and indicated clearly it was contesting Thailand’s dumping margin determination (under Article 2), injury and causation determination (under Article 3), and certain procedural matters (under Article 5). See *Thailand Steel* Appellate Body Report, *supra* note 195, ¶¶ 88, 90-96.

200. See *WTO Ruling in Thai Steel Dispute May Raise Bar in Antidumping Cases*, 17 Int’l Trade Rep. (BNA), at 1591 (Oct. 19, 2000).

201. See *Thailand Steel* Panel Report, *supra* note 189, ¶¶ 7.55-59, 7.132, 7.140-147.



On appeal, Thailand successfully disputed the Panel's narrow interpretation of the key terms of Article 3:1 of the AD Agreement.<sup>202</sup> Obviously, to buttress its case that it had acted properly in the injury determination, Thailand wanted to have all information examined, confidential or not. Sympathetic as the Appellate Body is to lexicographic sources and the use of trade law terms according to their ordinary meaning, it would have seemed that Thailand's appeal on this point was fruitless. Yet, the Appellate Body said that the Panel had mis-read the dictionary definitions of "positive" evidence and "objective" examination. These definitions did not suggest an investigating authority has to base an injury determination only on evidence disclosed to, or discernible by, the parties to an investigation. Indeed, the AD Agreement contemplates the use of both confidential and non-confidential information in an investigation, and Article 3:1 calls for an injury determination based on the totality of the evidence. In other words, held the Appellate Body, the Panel had grafted onto the ordinary meanings of "positive" and "objective" from the *Oxford English Dictionary* an interpretation that was narrower than demanded by those meanings.

The error of the Panel's ways was all the clearer from other provisions in the AD Agreement, which provide the context for the key terms of Article 3:1—"positive evidence" and "objective examination." In no way, said the Appellate Body, do these provisions indicate that an injury determination must be based solely on reasoning or facts disclosed to, or discernible by, the parties to an AD investigation. Rather, these provisions indicate that an investigating authority may make an injury determination on all relevant reasoning and facts before that authority. What provisions provide this context? The Appellate Body pointed to the following: Article 3:7 (which says that a threat of material injury must be "based on facts and not merely on allegation, conjecture or remote possibility"); Article 5:2 (which says an AD investigation may not be initiated based on "[s]imple assertion, unsubstantiated by relevant evidence"); Article 5:3 (which requires an investigating authority to "examine the accuracy and adequacy" of evidence in an AD petition); Article 6:2 (which requires that parties "shall have a full opportunity for the defence of their interests"); Article 6:9 (which says that the investigating authorities must, before a final determination is made, "inform all interested parties of the essential facts under consideration which form the basis for the decision"), and Article 12:2:2 (which says that a final determination must contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," and "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers").<sup>203</sup> In sum, then, the Panel need not have confined itself to considering only non-confidential documents disclosed to Polish firms at the time of the final determination.

What of the second key basis for the Thai appeal—the Panel's interpretation of Article 3:4 of the AD Agreement? The Appellate Body upheld, in its entirety, the

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202. See *Thailand Steel* Appellate Body Report, *supra* note 195, ¶¶ 98-112.

203. See *id.* ¶¶ 108-110.

Panel's rendition of the provision.<sup>204</sup> The Appellate Body applauded the Panel's use of customary rules of treaty interpretation in reaching its finding. The Panel had examined at length the meaning and context of the language of Article 3:4 and contrasted it with the wording of the subsequent provision, Article 3:5. In applying customary international law on treaty interpretation, the Appellate Body held that the Panel was being faithful to the first sentence of Article 17:6(ii) of the AD Agreement for analyses of the language of that agreement.

The Appellate Body seemed equally proud of the Panel's reliance on an earlier decision by the Appellate Body, *Argentina – Safeguard Measures on Imports of Footwear*, in which the Appellate Body interpreted an analogous provision in the Uruguay Round Agreement on Safeguards (specifically, Article 4:2(a) of that agreement).<sup>205</sup> With the Appellate Body ruling, the law on Article 3:4 of the AD Agreement was considerably clearer than before: all 15 economic variables listed therein had to be evaluated by the appropriate authority in every injury determination. Simply put, they are all mandatory factors.

Luckily for Poland, Thailand agreed to implement the Appellate Body recommendations by October 20, 2001.<sup>206</sup> For Poland, that meant revocation of the Thai order against the Polish firms involved in the case, Huta Katowice and Stalexport. The ending was a happy one for the WTO system, too, as compliance in yet another case appeared to be secured.

### **Commentary:**

#### 1. Scrutinizing Inferences Drawn from the Dictionary

The Appellate Body reasoning on Thailand's contention that the Panel had read Article 3:1 of the AD Agreement too narrowly ought to give hope to all WTO Members who might one day want to challenge how a panel reads a dictionary. As discussed above, the Panel had looked to a lexicographic source to define "positive" and "objective." From these ordinary meanings, the Panel inferred that it could not look to confidential information used by Thailand in its injury determination that was neither available nor discernible to the parties at the time of the final determination.

The Appellate Body read the same definitions in the same dictionary and drew an entirely opposite inference. That is significant, if for no other reason than it shows a certain aggressiveness—dare it be said, "activism"—on the part of the Appellate Body. It will not stand by idly and allow a panel to draw expansive interpretations from the dictionary. In turn, potential litigants ought to be on notice that in citing a lexicographic source to a panel, there is more work to be done than simply obtaining

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204. See *id.* ¶¶ 121-128.

205. For a discussion of this case, see *WTO Case Review 2000*, *supra* note 113, at 73-87.

206. See generally Daniel Pruzin, *Poland, Thailand Agree on Deadline in WTO for Implementing Ruling on Steel Dumping*, 18 Int'l Trade Rep. (BNA), at 892 (June 7, 2001).

a definition. That definition needs to be applied properly, and the application may involve some kind of inference from the definition.

Any inference-drawing by a WTO panel is precisely what the Appellate Body is likely to scrutinize. And so it should. How else is the Appellate Body to impose uniformity in the fabric of international trade jurisprudence but to look carefully at the use of ordinary meanings from the dictionary in different factual contexts? That is, how else is the Appellate Body to ensure that the legal interpretations of various provisions of the AD Agreement are sensible and consistent from one case to the next?

## 2. Saying “No” to Shoddy Injury Investigations

The Appellate Body and Panel holdings on the issue arising under Article 3:4 of the AD Agreement—whether it mandates an examination of all the factors listed therein in every determination about material injury—is highly significant. It is a resounding statement by the judges of Geneva against sloppy injury investigations, a clear effort to raise the bar in injury determinations by ensuring that authorities responsible for these determinations are thorough in their investigation.<sup>207</sup> In turn, there is increased pressure on the authorities to justify their affirmative material injury determinations, particularly where some or several of the mandatory factors listed in Article 3:4 do not suggest injury.<sup>208</sup>

The Appellate Body and Panel could have interpreted Article 3:4 in a much looser way than they did, as Thailand (and, as a third party, the United States) had urged them to do. The Thais focused on the word “relevant” in the phrase contained in Article 3:4—“all relevant economic factors and indices”—whereas the Poles emphasized the word “all.”<sup>209</sup> Further, the Thais read the semi-colons and the disjunctive (“or”) in Article 3:4 in a peculiar way. They saw Article 3:4 as comprised of four basic groups of factors, separated by semi-colons. Each of the groups contains one or more indices. The disjunctive appears in the first and fourth groups. The Thais thought that the delineation by semi-colons of four factor groups, and the use of “or” in the first and fourth groups, meant that the list in Article 3:4 was really a list of just four factors. In turn, said Thailand, all that is necessary is that at least one of the indices in each of the four factor groups be considered, *i.e.*, it is not necessary to examine every index in each group.

The Panel corrected Thailand on its reading of semi-colons and the word “or.” To the contrary, there were fifteen individual indices listed in Article 3:4. The list was mandatory, in that each index had to be evaluated in every case by the

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207. See *WTO Ruling in Thai Steel Dispute*, *supra* note 200, at 1591.

208. See Daniel Pruzin, *Appellate Body Upholds Polish Complaint Against Thai Antidumping Duties on Steel*, 18 Int'l Trade Rep. (BNA), at 443 (Mar. 15, 2001) [hereinafter Pruzin, *Appellate Body Upholds Polish Complaint*].

209. See AD Agreement art. 3:4, quoted *supra* note 190 and accompanying text.

investigating authority. Yes, a lawyer perhaps could read the provision in the manner Thailand was advocating. So, why not do so? The Panel cited another case—a panel report in *Mexico – Anti-Dumping Investigation on High-Fructose Corn Syrup (HCFS) from the United States*.<sup>210</sup> Yet, perhaps what the Panel was really doing was citing a precedent to avoid a protracted and controversial policy discussion. Surely it would be bad AD policy to read Article 3:4 as a “cafeteria plan” whereby an administering authority could pick and choose among the factors, specifically among the indices of each factor. That would render material injury determinations even more subjective than they already can be, by empowering the authority to discard certain indices. The subjectivity could be monstrous in certain countries where the administering authority is politicized (*e.g.*, captured by domestic special interests) or inexperienced.

Better to have every index of every factor at least considered in every case. That way, material injury determinations will be harmonized among WTO Members, and the reasoning to support each determination will be thorough. This consideration is more than just a mere checklist of factors to go through mechanically, as the Panel observed.<sup>211</sup> It is supposed to be a proper establishment of whether there is a factual basis on which to support a well-reasoned, meaningful analysis of the health of the industry in the importing country and a finding of material injury.<sup>212</sup> In brief, the Panel did not say as much, but what it must have had in mind was the adverse consequence from a loose interpretation of Article 3:4 of the AD Agreement.

If there is any “silver lining” in the Appellate Body’s ruling on Article 3:4, it may be found in what the Appellate Body said about Article 3:1. As discussed earlier, the Appellate Body overturned the Panel holding on confidential information, thereby allowing WTO panels to consider confidential information submitted to them that was not shared with interested parties during the injury investigation. In some cases, a respondent in a WTO AD case may be able to point out to the panel some confidential information that it examined. That information might support the respondent’s defense that it examined all of the Article 3:4 economic factors, which would ease, but only just a bit, the burden of justifying an affirmative injury determination.<sup>213</sup>

### **C. The Epistemology of Dumping, the Calculation of Normal Value, and Causation: The Japan Hot-Rolled Steel Case**

#### ***Citation:***

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210. See *Thailand Steel* Panel Report, *supra* note 189, ¶ 7.232. The *HCFS* case is WT/DS132/R, and the panel report was adopted by the DSB on 24 February 2000. There was no appeal in the case.

211. *Id.* ¶ 7.236.

212. *Id.* ¶ 7.236.

213. See Pruzin, *Appellate Body Upholds Polish Complaint*, *supra* note 208, at 444.

***United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*** (complaint by Japan, WT/DS184/AB/R)

The DSB adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, on 23 August 2001.

***Explanation:***

***1. The Basic Facts***<sup>214</sup>

In September 1998, a number of American steel companies, along with two major steel unions (the United Steel Workers of America and the Independent Steelworkers Union) filed an AD petition against certain steel products from Japan (as well as from Brazil and Russia<sup>215</sup>). The steel products at issue (*i.e.*, the subject merchandise) were hot-rolled, flat-rolled carbon-quality steel products (“hot-rolled steel”). The petitioners also alleged that critical circumstances existed with respect to Japanese steel imports. In November 1998, February 1999, and April-June 1999, the United States Department of Commerce (DOC) and the International Trade Commission (USITC) rendered, respectively, preliminary and final affirmative dumping margin and injury determinations on Japanese hot-rolled steel.

During its investigation, the DOC made a crucial decision that would later be at the heart of the WTO action brought by Japan against the United States. The DOC decided that it was not practicable to examine all six of the known Japanese steel producers and exporters. That is, it could not render a dumping margin determination on an individual basis for each of these companies. Hence, the DOC elected to conduct its dumping margin determination on the basis of a sample of Japanese producers. It selected three producers for the sample—the investigated respondents, Kawasaki Steel Corporation (“Kawasaki”); Nippon Steel Corporation (“NSC”); and NKK Corporation (“NKK”). To the DOC, at least, the selection was logical, because these three companies accounted for over 90 percent of all the known exports of the subject merchandise during the investigation period. The DOC calculated an

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214. This discussion is drawn from Panel Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, ¶¶ 2.1-2.9 (Feb. 28, 2001) [hereinafter *Hot-Rolled Steel Panel Report*]; Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, ¶¶ 63-70, 91-95 (Aug. 23, 2001) [hereinafter *Hot-Rolled Steel Appellate Body Report*]; *Update*, *supra* note 11, at 86-87.

For a discussion of AD and CVD laws generally, their invocation in trade disputes between the United States and Japan, and subject matters not covered by these laws, see Terence P. Stewart, *U.S. – Japan Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 ARIZ. J. INT’L & COMP. L. 689 (1999).

215. The investigations against Brazilian and Russian hot-rolled steel are not discussed herein. Brazil reserved its third party rights in the WTO case (and, of course, Russia was not a WTO Member at the time of the case).

individual dumping margin for Kawasaki, NSC, and NKK, based on an individual investigation of each company.

Accordingly, the preliminary and final dumping margins for Kawasaki were 67.59 and 67.14 percent, respectively. For NSC, the DOC calculated a 25.14 percent preliminary, and a 19.65 percent final, dumping margin. For NKK, the DOC calculated a 30.63 percent margin, which it changed to 17.86 percent as the final margin. The downward revisions of the preliminary individualized dumping margins reflected investigative developments following the preliminary affirmative dumping margin determination, namely, requests for information made by the DOC to the respondents; verification visits conducted by the DOC at the respondents offices in Japan and the United States; comments from interested parties; and a public hearing held in Washington, D.C.

As for the other three Japanese producer-exporters not included in the sample investigated, the DOC applied an "All Others Rate" ("AOR"). Investigating authorities like the DOC use an AOR when it is not practicable to compute a dumping margin for each individual respondent. The classic context is where there are too many respondents to do so. In general terms, the AOR is a weighted average of the dumping margins the authority has calculated for the individual respondents that it did investigate. In other words, the AOR is based on a sample—a subset—of all respondents, namely, those that were individually investigated and for which a unique dumping margin was calculated. The uninvestigated respondents—those not in the sample—are then "given" (or, "stuck with" might be the better verb) the AOR. Thus, in *Japan Hot-Rolled Steel*, the AOR was the weighted average of the dumping margins that the DOC had computed for the three investigated respondents. The preliminary AOR was 35.06 percent, and the final rate was lower—29.30 percent—given the downward revisions of the individual rates for Kawasaki, NSC, and NKK.

The relief for the American petitioners was dramatic, though wholly in line with the mandates of United States AD rules. Following the preliminary affirmative dumping margin determination, the DOC ordered the Customs Service to suspend liquidation of entries of the subject merchandise and to receive the posting of cash deposits (or bonds) from the respondents of estimated AD duties.<sup>216</sup> Normally, that order would be as of the date of the preliminary determination, which was February 19, 1999. However, the DOC agreed with the petitioners that critical circumstances existed, hence the DOC order for suspension of entries and posting of cash deposits would take effect 90 days prior to the preliminary affirmative dumping margin

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216. Under American AD rules, AD duties are not actually collected on a provisional basis. Instead, as the Panel helpfully noted, "the process of determining the exact amount of duties of all types owed on a specific import transaction, called 'liquidation,' is not carried out, *i.e.*, is suspended, and a deposit or bond in the amount of the preliminary dumping margin is required on all imports." *Hot-Rolled Steel Panel Report*, *supra* note 214, ¶ 2.6 n.10. The collection of actual duties occurs after the DOC establishes a final rate, issues its final order, and, in some cases if requested by one of the original parties, conducts a first annual administrative review.

determination. That is, all entries of subject merchandise beginning on November 21, 1998—not 19 February 1999—were subject to the order.

However, the drama surrounding the DOC's preliminary affirmative critical circumstances determination was somewhat short-lived. Two of the respondents soon were consoled by the DOC's final negative critical circumstances determination for NSC and NKK. That change resulted directly from the magnitude of their individualized dumping margins—both were below the 25 percent threshold, which is the level used by the DOC to impute knowledge of dumping to the importer and thereby justify the strong “90 extra days” remedy. Kawasaki or the three “all others” respondents also got some relief. The USITC rendered a negative critical circumstances determination, saying that the increase in imports over a short period was insufficient to support a finding that these increased imports would undermine the remedial effects of the AD order. Thus, the DOC's final AD order imposed estimated duties on the subject merchandise at the final rates, but it also called for the refund of cash deposits (and release of guarantees) that respondents had made during the period covered by the DOC's preliminary critical circumstances determination, *i.e.*, November 21, 1998 to February 19, 1999. In other words, at least the respondents could take comfort in that they got that money back.

In the WTO action, Japan alleged that the DOC's determinations were erroneous and that the DOC and USITC used deficient procedures in coming to their respective conclusions. The key violations on which Japan based its WTO complaint were Articles 2, 3, 6, 9, and 10 of the AD Agreement. The Panel focused on the violations of Articles 2 and 6 of the AD Agreement, applying the principle of judicial economy and eschewing unnecessary and inappropriate rulings, and interpreting its terms of reference narrowly to encompass only the Articles 2, 6, and 9 claims. Even with just these provisions at stake, there is plenty of textual complexity to the case. Both sides appealed various Panel decisions and after the Appellate Body's ruling, they agreed to the appointment of an arbitrator—outgoing Appellate Body member Florentino Feliciano of the Philippines—to set a time for compliance by the United States with recommendations in the Appellate Body's Report.<sup>217</sup>

## 2. Understanding Japan's Article 6 Claim on Facts Available and Adverse Facts<sup>218</sup>

Articles 6 and 9 of the AD Agreement both embody a principle of

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217. See Daniel Pruzin, *U.S., Japan OK Arbitrator to Set Deadline for Compliance in Hot-Rolled Steel Case*, 18 Int'l Trade Rep. (BNA), at 2050 (Dec. 20, 2001); Daniel Pruzin, *U.S., Japanese Agree on Arbitration to Implement Hot-Rolled Steel Deadline*, 18 Int'l Trade Rep. (BNA) 1917 (Nov. 29, 2001).

218. This discussion is drawn from *Hot-Rolled Steel* Panel Report, *supra* note 214, ¶¶ 2.1-2.9; *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 63-70, 91-95; *Update*, *supra* note 11, at 86-87.

“administrative economy.” They deal with two broad problems. First, what happens when a respondent (or any other interested party) is unwilling or unable to provide information to an investigating authority? Second, what happens when there are so many respondents in an AD case that the investigating authority cannot realistically manage to calculate a dumping margin for each individual respondent? Article 6 deals with the first problem by telling the investigating agency that it can rely on the facts it has at hand. Articles 6 and 9 deal with the second problem, essentially by authorizing the authority to rely on data from a sample of the respondents and to apply the dumping margin calculated on the basis of that sample data to the whole lot. That margin is called the “all-others” rate because it is applied to all the other respondents, *i.e.*, those for which an individual dumping margin was not calculated.

As to Article 6 of the AD Agreement, the relevant provisions at stake in the *Japan Hot-Rolled Steel* case were Article 6:1:1, Article 6:8, and Annex II (which is incorporated by reference in Article 6:8). Article 6:1:1 is a straightforward rule about deadlines:

Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply. Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown such an extension should be granted whenever practicable.<sup>219</sup>

Article 6:8 concerns the use of “facts available,” authorizing the use of such facts by an investigating authority in particular circumstances:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a *reasonable period* or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.<sup>220</sup>

In its seven paragraphs, Annex II develops a concept of “best information available,” without quite using that phraseology. The Annex provides:

1. As soon as possible after the initiation of the investigation, the

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219. AD Agreement art. 6:1:1, *reprinted in* HANDBOOK, *supra* note 10, at 401. A footnote to this provision states that the thirty day period starts as of the day the respondent (or other interested party) receives a questionnaire from the investigating authority, and receipt is deemed to have occurred within one week from the date on which it was sent by that authority. *See id.* at n.15.

220. AD Agreement art. 6:8, *reprinted in* HANDBOOK, *supra* note 10, at 403 (emphasis added).



investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a *reasonable time*, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (*e.g.*, computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, *e.g.*, it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, *e.g.*, it would entail unreasonable additional cost and trouble.
3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.
4. Where the authorities do not have the ability to process information if provided in a particular medium (*e.g.*, computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided *may not be ideal in all respects*, this should not justify the authorities from disregarding it, provided *the interested party has acted to the best of its ability*.
6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a *reasonable period*, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.
7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. *It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.*<sup>221</sup>

In sum, Annex II, paragraph 1, contains the general authorization for an investigating authority, like the DOC or USITC, to rely on facts available, including those provided by the petitioner in the AD case. It sets as a constraint for this reliance a “reasonable time” for response from the respondent. Paragraphs 2 and 4 concern the provision of information in electronic or other forms, essentially authorizing the investigating authorities to call upon an interested party to provide data in a particular format, but to be reasonable in such requests. Paragraph 3 calls upon the investigating authority, in rendering its determination, to examine all verifiable information. Similarly, Paragraph 5 urges the investigating authority to make use of the information provided, even if it is not perfect in every respect. Paragraph 6 instructs the investigating authority to explain a decision to reject information provided by an interested party, and, in effect, to give that party an opportunity to cure defects in the information. Paragraph 7 allows the investigating authority to use secondary sources, but urges it to corroborate them with other independent information.

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221. AD Agreement, Annex II, *reprinted in* HANDBOOK, *supra* note 10, at 417-18 (emphasis added).

The factual predicate for Japan's claim under Article 6:8 and Annex II of the AD Agreement was the rejection by the DOC of certain information submitted by NSC and NKK to the DOC after deadlines established by the DOC. The data were so-called "weight-conversion factors." As the Panel explained, steel mills sell steel in coils at prices per ton that are based on one of two possible weights: (1) the *actual* weight of the steel product, which is determined by physically weighing the steel, or (2) a *theoretical* weight, which is calculated using a formula based on the dimensions of the steel product.<sup>222</sup> The DOC needed weight conversion factors so that it could be consistent in the way it measured all transactions under investigation. As the DOC was individually investigating NSC, NKK, and Kawasaki, it wanted the factors for any sales made on a theoretical weight basis, so that it could convert such sales to actual weight transactions and thus ensure comparability across the investigated producer-exporters' transactions when calculating the respective dumping margins. NSC and NKK had made some sales on a theoretical weight basis, hence the DOC needed the weight conversion factors from them.

Kawasaki submitted a weight conversion factor that was its best estimate of what the "real" factor would have been. The DOC accepted Kawasaki's estimate. There was no dispute that NSC and NKK returned their initial set of answers to the DOC's questionnaires in a timely fashion—within the 87 days they had to respond. Nor was there any dispute that these answers failed to offer a real or estimated weight conversion factor. NSC said it had no way to calculate the factor, because it did not know the actual weight of the steel it had sold on a theoretical weight basis. NKK said that it was impracticable or impossible to provide the factor.

In the absence of weight conversion factors from NSC and NKK, the DOC applied "facts available" with respect to the NSC and NKK steel sales made on a theoretical weight basis and thereby rendered a preliminary dumping margin determination. Not surprisingly, the facts available happened to be unfavorable to the respondents. NSC and NKK were stuck with a higher preliminary dumping margin than they would have had if the DOC had used the weight conversion factors they subsequently submitted.

Subsequent submission is precisely what happened. Perhaps seeing the adversity of the facts available, NSC and NKK coughed up weight conversion factors—but, alas, after the deadlines. The applicable deadlines were December 21, 1998 (for the original questionnaire) and January 25, 1999 (for the supplemental questionnaire). The DOC made its preliminary determination on February 19, 1999. NSC and NKK submitted a weight conversion factor on February 23, 1999. NSC said that it had discovered the factor while preparing for the DOC's verification visit; specifically, it learned of the actual weight of the products it had sold on a theoretical weight basis. NSC said that the information was stored in a database in a production facility in southwest Japan and that the database was separate from NSC's main sales records that it kept at its headquarters in Tokyo. NKK's explanation was that it had discovered that the DOC accepted Kawasaki's best estimate as a surrogate for an

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222. *Hot-Rolled Steel* Panel Report, *supra* note 214, ¶ 7.32.

actual weight conversion factor. So, NKK offered its own best estimate weight conversion factor, using the same estimation methodology as had Kawasaki. Significantly, the DOC did not verify the weight conversion factor submitted by NSC, but it did verify NKK's factor.

"No way, too late" was the response of the DOC to the submission by NSC and NKK of weight conversion factors. The Panel politely condemned what it seemed to have thought of as intransigent behavior by the DOC. Applying Article 6:8 of the AD Agreement and Annex II thereto, the Panel said that no unbiased or objective investigating authority could have reached the conclusion that NSC and NKK failed to provide the weight conversion factors within a reasonable period of time. In other words, the United States, held the Panel, had run afoul of its Article 6:8 and Annex II obligations.

There was one other fact on which Japan predicated its claim under Article 6:8 and Annex II of the AD Agreement. It concerned the application by the DOC to Kawasaki of adverse facts available in calculating an individualized dumping margin.

Kawasaki had made a significant portion of its sales in the United States to a company called California Steel Industries ("California Steel"). This company was a joint venture ("JV") between Kawasaki and a Brazilian firm, Companhia Vale de Rio Doce ("Companhia"). Kawasaki and Companhia were 50-50 JV owners in California Steel. Interestingly, California Steel was one of the petitioners in the United States hot-rolled steel industry that brought the case at bar. To calculate the individual dumping margin for Kawasaki, the DOC needed to construct an export price for Kawasaki's sales in the United States.

The dumping margin is the difference between Normal Value and Export Price, but where the foreign respondent and the buyer in the United States are related, as were Kawasaki and California Steel through the JV arrangement, a Constructed Export Price has to be used in lieu of Export Price. That Constructed Export Price is the first sale of the subject merchandise to an independent buyer, *i.e.*, from California Steel to a third party. Hence, the DOC asked Kawasaki for information on the price at which California Steel re-sold the subject merchandise—the hot-rolled steel that it had purchased from Kawasaki—to an independent buyer. The DOC also asked Kawasaki to give it information about California Steel's manufacturing costs.

Kawasaki met with California Steel and sent five separate letters to it during a 13-week period. All that was to no avail because California Steel refused to supply the relevant information. Before submitting its response to the DOC's questionnaire, Kawasaki explained to the DOC its difficulties in gathering the information the DOC had requested about California Steel, and Kawasaki asked the DOC to excuse it from providing this information. One difficulty noted by Kawasaki was that it could not order California Steel to submit documents to the DOC without violating United States antitrust laws.<sup>223</sup> Nevertheless, the DOC neither excused Kawasaki nor offered

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223. See Toshio Aritake, *Japanese Steel Mills Preparing Complaints to WTO Over ITC Decisions*, 16 Int'l Trade Rep. (BNA), at 1017 (June 16, 1999) [hereinafter Aritake, *Japanese Steel Mills*].

any assistance in gathering the information. The DOC also did not ask California Steel directly for the information. Put colloquially, from the Japanese perspective, the DOC “put the squeeze” on Kawasaki. At the same time, Kawasaki did not look to its JV partner, Companhia, to persuade California Steel to offer up the information about re-sale prices and manufacturing costs. In its final determination, the DOC ruled that Kawasaki had not been fully cooperative with it in trying to obtain the necessary information. Consequently, the DOC applied adverse facts available to Kawasaki. The unsurprising result was a significant increase in Kawasaki’s overall dumping margin.

In the WTO case, Japan complained that the DOC was wrong to say Kawasaki had not cooperated and to apply adverse facts available. The Panel agreed with Japan. Citing paragraph 7 of Annex II of the AD Agreement, the Panel observed that the application of less favorable facts is appropriate only against an interested party that does not cooperate in the investigation. The Panel said that no unbiased or objective investigating authority could have concluded, on the record, that Kawasaki had been uncooperative. The case was quite the contrary. Hence, the DOC had violated Annex II, paragraph 7, by applying adverse facts to Kawasaki.

### 3. Understanding Japan’s Article 9:4 Claim on Calculating an All-Others Rate<sup>224</sup>

As for Japan’s claim under Article 9 of the AD Agreement, it concerned the way in which the DOC had gone about calculating a dumping margin for the respondent producer-exporters that were not individually exported—*i.e.*, the computation of an AOR for the respondents other than Kawasaki, NSC, and NKK. The relevant part of Article 9 to this claim was paragraph 4. However, Article 9:4 is closely related and refers to Article 6:10 of the AD Agreement. Article 6:10 concerns deviations by an investigating authority from the calculation of a dumping margin for each individual respondent. It authorizes sampling among a large number of respondents and applying the resulting AOR to the respondents for which an individual margin was not calculated. But the authorization is not a blanket one, as Article 6:10 indicates:

The authorities shall, as a rule, determine an individual margin of dumping for *each* known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the

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224. This discussion is drawn from *Hot-Rolled Steel* Panel Report, *supra* note 214, ¶¶ 2.1-2.9; *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 111-112; *Update*, *supra* note 11, at 86-87.

authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

- 6.10.1. Any selection of exporters, producers, importers or types of product made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.
- 6.10.2. In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.<sup>225</sup>

What Article 6:10 does not address is whether there are limits on the magnitude of the all-others dumping margin that can be applied to a respondent not included in the sample used by the investigating authority to calculate a margin. In other words, are respondents for which an individual dumping margin was not calculated stuck with whatever the authority calculates on the basis of the sample and thus at the mercy of the numbers relevant to the sampled respondents?

Article 9:4 of the AD Agreement answers this question in the negative. Article 9:4 states:

When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination *shall not exceed*:

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<sup>225</sup>. AD Agreement art. 6:10, *reprinted in* HANDBOOK, *supra* note 10, at 403 (emphasis added).

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers, or
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

*provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6 [quoted above]. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in sub-paragraph 10.2 of Article 6.*<sup>226</sup>

In essence, Article 9:4 establishes three constraints on the magnitude of the all-others rate that can be applied to a respondent in the above-quoted clauses (i) and (ii), and the language following those clauses, respectively.

First, it cannot exceed the weighted average dumping margin that the investigating authority established on the basis of sampling. That ceiling may not sound like much of a constraint. But, at least a respondent can rest assured that it will not be victimized by the AOR, in the sense of being “stuck” with a margin higher than that calculated for the sample. Second, if a prospective Normal Value is used, as generated from a sample of respondents, then the dumping margin cannot exceed the difference between that prospective Normal Value and the individual export prices associated with the respondents not included in the sample. Third, every respondent has the right to present individualized information, and, under certain circumstances, to expect that this information will be used to calculate a dumping margin applicable to it.

Significantly, however, Article 9:4 of the AD Agreement does not tell WTO Members how they ought to calculate an AOR. To be sure, it anticipates, explicitly, that the computation will be a weighted average of individual dumping margins. That anticipation is further evident from the two caveats contained in Article 9:4 with respect to the maximum limit on an AOR. First, in calculating an AOR based on a weighted average, the investigating authority cannot include any zero or *de minimis* dumping margin. That caveat favors petitioners. If zero or *de minimis* margins could be included, then obviously the weighted average (and, hence the AOR) would be reduced. Second, the weighted average cannot include an individual dumping margin

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<sup>226</sup> AD Agreement art. 9:4, *reprinted in HANDBOOK, supra* note 10, at 407 (emphasis added).

“established under the circumstances referred to” in Article 6:8, *i.e.*, through the use of facts available.

It is the second caveat that gave rise to Japan’s Article 9:4 claim. The Panel agreed with Japan’s claim that the DOC’s calculation of an AOR for uninvestigated respondents ran afoul of Article 9:4 of the AD Agreement. But, where, exactly, did the violation lie? The problem was embedded in one of United States’ highly technical AD rules, namely, 19 U.S.C. § 1673d(c)(5) (Section 735(c)(A) of the Tariff Act of 1930, as amended):

1673d. Final determinations

.....

(c) Effect of final determinations.

.....

(5) Method for determining estimated all-others rate.

(A) General rule.

For purposes of this subsection and section 1673b(d) of this title [section 733(d) of this Act], the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined **entirely** under section 1677e of this title [section 776 of this Act, which addresses the determination of a dumping margin entirely on the basis of facts available].

(B) Exception.

If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined **entirely** under section 1677e of this title, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted



average dumping margins determined for the exporters and producers individually investigated.<sup>227</sup>

In brief, the United States statute obligates the DOC to exclude a dumping margin based “entirely” on facts available only when calculating an all-others rate.

It is the word “entirely,” highlighted above, that is the problem. The context is how to calculate an AOR for uninvestigated respondents. Article 9:4 of the AD Agreement and the American statute both say that an AOR may be the weighted average dumping margins calculated for the individually investigated respondents. Both laws agree that zero and *de minimis* margins should be excluded from the computation of a weighted average. Article 9:4 states that an investigating authority must exclude from the weighted average “margins established under the circumstances referred to in paragraph 8 of Article 6,” *i.e.*, on the basis of facts available. The American statute does not appear to go quite this far. It requires that the DOC exclude from the weighted average used for an AOR “any margins determined entirely” on the basis of facts available.

The highly detailed, but significant, question is what about a dumping margin based in part, though not entirely, on facts available? Every dumping margin calculation is a zero-sum game between a petitioner (who wants to maximize the dumping margin) and a respondent (who wants to minimize the dumping margin). In this game, the petitioner will want a margin based partly on facts available excluded from the calculation of the weighted average if exclusion would lower the average and, therefore, the AOR. Conversely, the respondent would want a margin based partly on facts available to be included in the weighted average, if it lowered the average and thereby the AOR.

What happened in the case? Clearly, the DOC included individual dumping margins it had rendered for the investigated respondents on the basis of facts available in the computation of a weighted average dumping margin and thus arrived at an AOR for the un-investigated respondents. That is, in calculating individual margins for Kawasaki, NSC, and NKK, the DOC used facts available for part, but not the entirety, of the calculation.<sup>228</sup> The DOC’s use of facts available to calculate these individual margins resulted in increases in the magnitude of the margins. In turn, the AOR increased because the AOR was a weighted average of the individual margins. Put directly, the unhappy, uninvestigated respondents got “stuck” with a higher AOR than they would have had if the DOC had excluded from the weighted average the individual margins that were drawn, in part, from facts available.

Thus, the Japanese complained. Japan said that the DOC should have excluded from the computation of an AOR any dumping margin that was based even partly on facts available. That, after all, was the way to read Article 9:4 of the AD Agreement.

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227. 19 U.S.C. § 1673d(c)(5), *reprinted in HANDBOOK*, *supra* note 10, at 1159 (emphasis added).

228. *See Hot-Rolled Steel Appellate Body Report*, *supra* note 214, ¶ 129 n.86.

Not so, said the United States. Article 9:4 and the American statute could be read consistently to mandate the exclusion from the weighted average calculation of an individual margin only if that margin was based entirely on facts available.

The Panel said that Japan was correct. The word “entirely” in the American statute causes the statute to be inconsistent with Article 9:4 of the AD Agreement. Under the statute, the DOC seems to be required to consider a dumping margin based in part on facts available when it is computing an AOR for uninvestigated respondents. The Panel also agreed with Japan that the DOC had applied the statute in a way contrary to Article 9:4. In other words, there was both a *prima facie* inconsistency between the statute and the Uruguay Round agreement, and a *de facto* inconsistency between DOC practice and that agreement.

#### 4. Understanding Japan’s Article 2:1 Claim on Excluding Sales to Affiliates<sup>229</sup>

What about the claim made by Japan under Article 2 of the AD Agreement? This claim was conceptually different from the claim under Articles 6 and 9. The Article 2 claim was about the calculation *per se* made by the DOC of the dumping margin, whereas the Articles 6 and 9 claims were about the way the DOC went about the calculation. In other words, the Article 2 claim was more about the substance of the calculation itself, in contrast to the procedural focus of the Article 6 and 9 claims.

The key provision at issue in Article 2 was the first paragraph, which states:

For the purpose of this Agreement, a product is to be considered as being dumped, *i.e.*, introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.<sup>230</sup>

Japan objected to the fact that the DOC had excluded certain home-market sales (*i.e.*, sales made in Japan) to affiliated parties from the calculation of Normal Value. The DOC did so on the basis of an “arm’s length” test (also called a “99.5 percent” test). Specifically, the DOC excluded sales made by affiliates of one of the exporters under investigation to dependent purchasers. Japan also objected to the DOC’s replacement, for purposes of calculating Normal Value, of the excluded home-market sales with sales to unaffiliated (*i.e.*, independent) downstream purchasers. Worse yet, said Japan, the DOC compounded this mistake with a second violation of Article 2:1. The DOC replaced the home-market sales it had excluded on the basis of the 99.5

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229. This discussion is drawn from *Hot-Rolled Steel* Panel Report, *supra* note 214, ¶¶ 2.1-2.9; *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 131-36; *Update*, *supra* note 11, at 86-87.

230. AD Agreement art. 2:1, *reprinted in* HANDBOOK, *supra* note 10, at 392.

percent test with downstream sales in the home-market to independent buyers. The Panel agreed with Japan's arguments, finding a violation of Article 2:1 of the AD Agreement.

What, precisely, were the violations the Panel found? To understand them, it is critical to appreciate the context in which the DOC uses the 99.5 percent test. In every dumping margin calculation, the DOC must arrive at Normal Value (or a proxy therefore based on third country prices, or on Constructed Value) from which it subtracts Export Price (or Constructed Export Price). This need arises out of the basic dumping margin formula.

Normal Value refers to sales of a like product (*i.e.*, of a product like the subject merchandise that allegedly is being dumped in an export market) by a respondent in its home-country market, which, in the *Hot-Rolled Steel* case, is Japan. However, the home market sales have to be made "in the ordinary course of trade," as Article 2:1 of the AD Agreement puts it. Otherwise, the figure for Normal Value would be biased—upward or downward—by oddball transactions. It would, as the Appellate Body pointed out, be abnormal:

Article 2:1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", from the calculation of normal value, precisely to ensure that normal value is, indeed, the "normal" price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.<sup>231</sup>

Unfortunately, nothing in the AD Agreement gives guidance as to how to decide whether sales are in or outside of the ordinary course of trade. But, one standard that is universally accepted is that sales by a respondent to a buyer with which it has a corporate affiliation could be troublesome. Again, the Appellate Body was instructive:

[W]here the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically *independent*, transacted at market prices, the sale effectively involves a transfer of goods within a *single* economic enterprise. In that situation, there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace. The sales

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231. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 140.

transaction might be used as a vehicle for transferring resources within the single economic enterprise. Thus, the sales price may be *lower* than the “ordinary course” price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be *higher* than the “ordinary course” price, if the purpose is to shift resources to the seller, who receives higher revenues for the sale than would be the case in the marketplace. There are many reasons relating to corporate law and strategy, and to fiscal law, which may lead to resources being allocated, in these ways, within a single economic enterprise.<sup>232</sup>

In brief, sales to affiliated (or dependent) purchasers could skew the Normal Value calculation, and the issue is how to avoid that happening without being over- or under-inclusive in terms of the data from which to draw Normal Value.

As was alleged in the case by the petitioners, some of the sales in Japan are made by the producer-exporter to affiliated purchasers, that is (following the definition of “affiliate” in the United States statute, 19 U.S.C. § 1677(33)(E)) to buyers that own, control, are owned, by or are controlled by, the producer-exporter, where ownership or control are defined as holding 5 percent or more of the voting shares of a company. Certainly, it is possible that the producer-exporter would give an affiliated buyer a “break” on the price. Perhaps it might sell steel to an independent buyer at \$1,000 per ton, but offers the steel to an affiliate at \$850. Or, as the Appellate Body suggests in the above-quoted passage, the respondent might want to shift resources to itself and charge the affiliate \$1,150 per ton.

As is implicit in the Appellate Body’s teaching, the DOC’s calculation of Normal Value is based on a weighted average of selling prices in the respondent’s home market. Plainly, if the prices in sale transactions to affiliates are included in this weighted average, and if those prices are unusually low—say, considerably below the sale prices to unaffiliated buyers—then the weighted average will be dragged down. The result will be a low Normal Value and hence a low (or non-existent) dumping margin, to the chagrin of the petitioner. Therefore, petitioners are wont to lobby for exclusion from the Normal Value calculation of any sales made by the respondent in its home market to an affiliated buyer. Naturally, the converse incentive structure exists for respondents.

In actual practice, the DOC attempts to curtail some argumentation here by using a 99.5 percent test. It applies the test to determine whether the sales to an affiliate are really at “arm’s length,” just as they would be to an independent buyer. The DOC simply looks at the prices the respondent charged to each unaffiliated purchaser and takes a weighted average of them for the entire group of unaffiliated buyers. In effect, the DOC calculates two weighted averages here. First, the DOC averages all

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232. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 141 (emphasis in original).

the sales to each independent buyer, which results in a single figure for each such buyer. Then, the DOC calculates a weighted average among all the independent buyers. The “bottom line” is a group weighted average, *i.e.*, one number that captures the average sales price charged by the respondent to unaffiliated buyers.

The DOC also examines the sales prices on transactions to each affiliated purchaser. But, the DOC does not compute a weighted average price for the entire group of affiliated buyers. Rather, it computes an average price on all sales made to each affiliate, on a buyer-to-buyer basis, and it stops there. In other words, the weighted average the DOC calculates for unaffiliated buyers is a computation of all sales made to all non-affiliated purchasers. It is, therefore, truly a weighted average for the group of these buyers. In contrast, the weighted average for the affiliated companies is not a group figure. Rather, there are several figures, one figure being unique to each such company, based on sales to that company. The result is a group weighted average for sales to all independent buyers and individual averages for sales to each affiliated buyer.

What does the DOC do with the unaffiliated group average price and the affiliated individual average prices? Simply put, it renders a comparison between the group average and each individual average. As long as an average affiliated sale price is 99.5 percent or more of the group average unaffiliated sale price, the DOC deems the respondent’s sales to its affiliates as having been made at arm’s length. In the language of Article 2:1 of the AD Agreement, these sales are made “in the ordinary course of trade.” In turn, the DOC includes these ordinary-course sales in the calculation of Normal Value. It is worth highlighting the repercussion of this result: the DOC is saying that all of the sales made by the respondent to its affiliate are in the ordinary course. Certainly, the DOC has just gone through calculating a weighted average of the sale prices to that affiliate, which suggests the possibility that some sales might have been at less than 99.5 percent of the price of the group average unaffiliated price. No matter, though. The key fact is that the average of all sales to that affiliate crosses the 99.5 threshold; so, they all are deemed in the ordinary course.

Suppose a particular average affiliated sales price happens to be less than 99.5 percent of the group average unaffiliated sale price. Then, the DOC says that none of the sales to that affiliate were in the ordinary course of trade—*i.e.*, the affiliation between the respondent and the particular buyer in question has infected all the transactions, or biased them in a way that casts doubt on all the individual sales transactions. When that happens, the DOC excludes the affiliated sales made to that buyer from Normal Value. Clearly, some of the specific sales to the affiliate might have crossed the 99.5 percent threshold. But that does not matter. Of consequence is the average of all the sales made by the respondent to that individual affiliated buyer; it is the average price that must cross the threshold. If it does not, then the DOC deems all sales to the affiliate in question to have been outside the ordinary course, even though some may not have been. The DOC then has no choice in its Normal Value calculation but to turn to the first resale price between that affiliate and an independent party.

In brief, what the DOC does is compare sale prices made by a respondent to its

affiliate against a group average price derived from sales to independent buyers. The benchmark for inclusion of sales to any given affiliates is 99.5 percent. What intrigued—to put it diplomatically—the Japanese was that the 99.5 percent test was mandated neither by the United States AD statute nor by the federal regulations applicable to the DOC. Rather, it was consistent custom and practice. The Japanese argued that the test was inconsistent with Article 2:1 of the AD Agreement because it was arbitrary and biased. The test was arbitrary because it failed to take into account usual fluctuations in market prices. It was biased because it excluded only low-priced sales to affiliates of a respondent and thereby inflated Normal Value. Consequently, argued the Japanese, the test was not an appropriate way to implement the language of Article 2:1 concerning whether sales are made “in the ordinary course of trade.”

As intimated earlier, the Panel agreed with the Japanese argument. To be sure, the Panel acknowledged, that the AD Agreement does not define the phrase “sales in the ordinary course of trade.” Nevertheless, the Panel saw the DOC’s practice as nothing more than a check on whether sales made to an individual affiliate of the respondent were at 99.5 percent of the average sales price to the group of unaffiliated buyers. The DOC simply was asking, “Is it lower than the benchmark or not?” That query, reasoned the Panel, hardly amounted to an investigation into what the “ordinary course” of trade really was. The DOC was inferring that sales below the benchmark were outside the ordinary course. But, queried the Panel rhetorically, sales above the benchmark could be outside the ordinary course too? A respondent might charge its affiliate prices well above the affiliate group average. (Among possible motivations would be internal pricing strategies or tax considerations.) Yet, the DOC would view these sales as within the ordinary course, even though their inclusion in Normal Value would inflate that value.

#### 5. Understanding Japan’s Article 2:1 Claim on Excluding Downstream Home Market Sales<sup>233</sup>

Japan also was able to persuade the Panel of another flaw, under Article 2:1 of the AD Agreement, in the DOC’s calculation of Normal Value. Based on the 99.5 percent test, the DOC excluded home-market sales from a respondent producer-exporter to an affiliate as outside of the ordinary course of trade. With what transactions did the DOC replace such sales? The answer is the first downstream home-market sale between an affiliate and an independent buyer—so-called “downstream” sales. The Panel agreed and looked to Article 6:10 of the AD

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233. This discussion is drawn from *Hot-Rolled Steel* Panel Report, *supra* note 214, ¶¶ 2.1-9; *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 159-160; *Update*, *supra* note 11, at 86-87.

Agreement for textual support. Under Article 6:10,<sup>234</sup> the Panel observed that even if a downstream sale from an affiliate of a respondent to an independent buyer occurs in the ordinary course of trade, that sale is not relevant to the investigation of the respondent. The reason is that the sale is not one made by the respondent—the exporter or producer—actually being investigated, *i.e.*, for which the investigating authority is calculating a dumping margin.

The Panel also found support for Japan's position in Articles 2:2 and 2:3 of the AD Agreement. These provisions state:

2:2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

...

2:3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.<sup>235</sup>

The Panel contrasted the express permission in Article 2:3 given to an investigating authority to calculate export price on the basis of downstream sales with the silence of Article 2:2 on the use of downstream sales to compute Normal Value. Japan was right, said the Panel, in doubting the argument of the United States that it was fine to use downstream sale prices in Normal Value by virtue of the permission to do so for

234. *See supra* note 225 and accompanying text (quoting Article 6:10).

235. AD Agreement arts. 2:2, 2:3, *reprinted in* HANDBOOK, *supra* note 10, at 393-94 (footnote to art. 2:2 omitted).

export price. The implicit inference in the American argument—that permission in Article 2:3 could be extended to Article 2:2—was too much of a stretch. Indeed, the silence in Article 2:2 ought to be respected. The drafters of the AD Agreement may well have intended that downstream sales not be used in Normal Value.

#### 6. Understanding Japan's Article 3:1 and 3:4 Claim on Captive Production<sup>236</sup>

In the *Hot-Rolled Steel* case, Japan was unhappy about more than just the facts used by the DOC and its calculation of Normal Value. Japan also took issue with the injury determination rendered by the USITC. Japan based a claim about so-called “captive production” on Articles 3:1 and 3:4 of the AD Agreement. These provisions state:

3:1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

....

3:4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.<sup>237</sup>

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236. This discussion is drawn from *Hot-Rolled Steel* Panel Report, *supra* note 214, ¶¶ 2.1-2.9; *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 181-187; *Update*, *supra* note 11, at 86-87.

237. AD Agreement arts. 3:1, 3:4, *reprinted in* HANDBOOK, *supra* note 10, at 396. They are quoted earlier (*see supra* note 190 and accompanying text) and laid out again here for the convenience of the reader.



“Captive production” refers to internal transfers of a like product, *i.e.*, transfers within different parts of a business enterprise of a product that is like the merchandise subject to the AD investigation. The captive production does not enter the open market. Thus, such transfers are distinguished from the “merchant market,” into which a like product is sold to independent buyers. The most common situation in which a like product is consumed captively is where the producer of that product is integrated vertically. That producer uses the captive production to make a downstream product, such as a finished product, a derivative of the product, or a more advanced version of the product.

The existence of captive production raises an interesting problem in an injury determination. Domestic producers whose production is captive do not compete directly with importers. After all, a respondent producer-exporter almost always sells imports of the subject merchandise into the merchant market. In contrast, domestic producers themselves consume captive production—the good they make—so as to produce some other product. These producers have no need to buy an imported product that competes with their captive production. This market segmentation suggests that an investigating authority, like the USITC, when making an injury determination, ought to focus only on the merchant market—where the domestically-produced like product is sold openly, to buyers autonomous of the producer—in direct competition against imports.

Indeed, the relevant United States AD statute on captive production, 19 U.S.C. § 1677(7)(C)(iv) (Section 771(7)(C)(iv) of the Tariff Act of 1930), directs the USITC to “focus primarily” on the merchant market segment of the domestic industry, rather than on the entire domestic industry (*i.e.*, not the merchant market plus the captive production market), when “determining market share and the factors affecting financial performance” of the industry:

If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the [International Trade] Commission finds that –

- (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,
- (II) the domestic like product is the predominant material input in the production of that downstream article, and
- (III) the production of the domestic like product sold in the merchant market is not generally used in the production

of that downstream article,

then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii) [*i.e.*, 19 U.S.C. § 1677(C)(iii)], which instructs the Commission to evaluate “all relevant economic factors” impacting the state of the domestic industry, and lists as examples “actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,” “factors affecting domestic prices,” “actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,” “actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product,” and “the magnitude of the margin of dumping”<sup>238</sup>], shall focus primarily on the merchant market for the domestic like product.<sup>239</sup>

In the *Hot-Rolled Steel* case, Japan complained that the above-quoted American statute was *prima facie* inconsistent with Articles 3:1 and 3:4 of the AD Agreement.

This captive production provision was added by Congress after a 1993 negative injury determination rendered by the USITC in a dumping investigation of hot-rolled carbon steel flat products.<sup>240</sup> The USITC said that the level of imports was just a small percentage of total production of hot-rolled steel made in the United States.<sup>241</sup> The change in AD law appears designed to avoid this kind of outcome by ordering the USITC to segment the industry in certain cases. So, in the *Hot-Rolled Steel* case, the USITC based its affirmative injury determination on only 30 percent of the domestic sales of American steel producers, and it ignored the larger and more profitable segment of the market where producers consume hot-rolled steel internally to manufacture other products.<sup>242</sup>

Precisely what was the inconsistency alleged by Japan? As the Appellate Body characterized Japan’s claim, it lay in the statutory instruction to the USITC to focus primarily on the merchant market. That instruction “prevents a balanced assessment of the situation of the domestic industry as a whole and ignores the fact that a significant part of the domestic industry—captive production—is shielded or protected from the effects of the allegedly dumped imports.”<sup>243</sup> In essence, Japan was

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238. 19 U.S.C. 1677(7)(C)(iii), reprinted in HANDBOOK, *supra* note 10, at 1205.

239. 19 U.S.C. 1677(7)(C)(iv), reprinted in HANDBOOK, *supra* note 10, at 1206.

240. See Daniel Pruzin, *WTO Issues Mixed Preliminary Ruling in U.S. – Japan Hot-Rolled Steel Dispute*, 18 Int’l Trade Rep. (BNA), at 145, 146 (Jan. 25, 2001).

241. *Id.*

242. *Id.*

243. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 182.

asking what kind of injury determination is it that pays attention only to the segment of an industry that competes with imports, yet leaves out a sector that, by definition, is protected from that competition? Indeed, was not the USITC mis-interpreting its own statute? The words “focus primarily” in 19 U.S.C. § 1677(7)(C)(iv) do not mean “focus exclusively.” But, argued Japan, putting an exclusive focus on the merchant market was precisely what the USITC had done in the case. As a result, it violated the mandates of Article 3:1 and 3:4 of the AD Agreement, namely, to make an “objective examination,” and to evaluate “all relevant economic factors . . . having a bearing on the domestic industry,” respectively.<sup>244</sup>

The Panel disagreed. It said that on its face, the American statute was not inconsistent with the AD Agreement. The key—as Japan itself suggested—was whether the statute forced the USITC to focus on the merchant market to the exclusion of captive production. A plain-meaning approach to the words “focus primarily” evinced no such compulsion. Further, the *Statement of Administration*—the Clinton Administration’s authoritative expression on the interpretation and application of the AD Agreement—indicated that “the captive production provision does not require USITC to focus exclusively on the merchant market.”<sup>245</sup> Therefore, concluded the Panel, there was no *prima facie* inconsistency. The Panel also found no inconsistency in practice. Japan, unsatisfied with this result, appealed.

### 7. Understanding Japan’s Article 3:5 Claim on Causation<sup>246</sup>

Article 3:5 of the AD Agreement states:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4,<sup>[247]</sup> causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. *The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.* Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports

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244. AD Agreement, Arts. 3:1, 3:4, reprinted in HANDBOOK, *supra* note 10, at 396.

245. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 186.

246. This discussion is drawn from *Hot-Rolled Steel* Panel Report, *supra* note 214, ¶¶ 2.1-2.9; *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 216-221; *Update*, *supra* note 11, at 86-87.

247. These provisions, along with Article 3:5, are quoted earlier. See *supra* note 190 and accompanying text. Article 3:5 is laid out again here for the convenience of the reader.

not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.<sup>248</sup>

The essence of Japan's causation claim is suggested by the sentence highlighted above. That sentence is known as the "non-attribution language" of Article 3:5,<sup>249</sup> obviously so named because it calls upon an investigating authority to avoid attributing causation of injury to dumped imports when, in reality, some other factor or factors are to blame. First, said Japan, the USITC did not conduct an adequate examination of factors other than imports of hot-rolled steel that were allegedly dumped. Yet, these other factors also caused injury to domestic steel producers. Second, the USITC failed to ensure that the injury caused by these other factors was not attributed to the dumped imports. In other words, the USITC's analysis confused damage caused by the other factors with damage supposedly caused by the imports.

What were these "other" factors? Japan listed four: (1) an increase in the production capacity of mini-mills in the United States; (2) the effects of a strike at General Motors; (3) a decline in demand for hot-rolled steel from the pipe and tube industry in the United States; and (4) the effect of prices of non-dumped imports. The Panel looked at these factors and the work of the USITC and rejected Japan's claim. In doing so, the Panel interpreted the non-attribution language of Article 3:5. It said that the job of the investigating authority "is to examine and ensure that these other factors *do not break the causal link that appeared to exist between dumped imports and material injury on the basis of an examination of the volume and effects of dumped imports* under Articles 3:2 and 3:4 of the AD Agreement."<sup>250</sup> In other words, Article 3:5 is an embellishment on Articles 3:2 and 3:4. The non-attribution language of Article 3:5 focuses on the chain of causation, from the volume and effects of the imports being dumped, to the injury to the petitioning industry, that would be established under Articles 3:2 and 3:4. Having established that chain, the non-attribution language demands a further inquiry: is there anything that disrupts the causal chain?

The Panel's approach accorded with common sense, as any patient going to a medical doctor is aware. The physician's task is to examine an injury and determine its cause. In that determination, the doctor must rule out all other possible causes; otherwise, the choice of the appropriate remedy to match the illness is impossible. But, exactly where did the Panel find support for its interpretation? None other than *de facto* precedent—that of another panel, and of the Appellate Body. The Panel

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248. AD Agreement art. 3:5, *reprinted in* HANDBOOK, *supra* note 10, at 396-97 (emphasis added).

249. *See Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 217.

250. *Hot-Rolled Steel* Appellate Body Report, *supra* note 190, ¶ 217 (emphasis added); *see also Hot-Rolled Steel* Panel Report, *supra* note 190, ¶ 7.251.

cited a pre-WTO-GATT Panel Report, *United States – Atlantic Salmon Anti-Dumping Duties*,<sup>251</sup> plus an Appellate Body Report, *United States – Wheat Gluten Safeguard*.<sup>252</sup>

The jurisprudence developed in these reports indicated that it was not necessary for an investigating authority to demonstrate that dumped imports, alone, caused injury.

That is, there was no need to deduct the injury caused by other factors from the overall injury to the petitioning industry, and thereby obtain the extent of causation attributable solely to dumped imports. However, it is essential to avoid attributing an injury caused by another factor to the dumped imports. In brief, the Panel concluded that the non-attribution language of Article 3:5 did not call for isolation of each of the other potential independent variables, nor for a finding that dumped imports alone were capable of causing the injury. Rather, the language mandated clarity of thought, *i.e.*, avoidance of confusion of every other variable with dumped imports.

### 8. The Complex Appeal<sup>253</sup>

*Hot-Rolled Steel* is not an easy case to sort out, though the Appellate Body is not to be blamed for this. Its opinion is probably as clearly organized as possible, given the subject matter on which it had to rule. It faced a number of complex AD issues raised by both the complainant and respondent. The appeal puts the reader squarely in the middle of a shoot-out, caught in a cross-fire of argument on technical AD issues – presumably not unlike the Appellate Body members must have felt. Having said that, the arguments themselves are not that difficult to comprehend—indeed, most are straightforward—if a little time and patience is allowed.

The United States fired three salvos on appeal.<sup>254</sup> First, it said that the Panel was wrong to fault the DOC, under Article 6:8 of the AD Agreement, in its use of facts available and its application of adverse facts. Second, the United States contended that its calculation of the AOR, contrary to the opinion of the Panel, was proper under Article 9:4 of the AD Agreement. Third, the American side argued that the Panel misinterpreted the “ordinary course of trade” phraseology in Article 2:1 of the AD Agreement.

The appeal was worthwhile, though only partly so, for the United States. The Appellate Body upheld the Panel’s conclusion on Article 6:8 of the AD Agreement, finding that the application by the DOC of facts available to Kawasaki, NSC, and

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251. See *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, GATT B.I.S.D. (41st Supp., vol. 1) at 229 (1994) (adopted by the Committee on Antidumping Practices, Apr. 27, 1994).

252. See *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Jan. 19, 2001). This case is discussed later in this Review.

253. This discussion is drawn from *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 49.

254. *Id.* ¶ 49(a)-(c), (f)(i)-(iv).

NKK was incorrect.<sup>255</sup> That is, the key loss on appeal sustained by the United States was on the epistemology of a dumping margin calculation—when is it appropriate to rely for knowledge about a dumping margin on facts available? The Appellate Body faulted the DOC for rejecting the weight conversion factors submitted after the deadline by NSC and NKK and for applying to Kawasaki adverse facts about California Steel’s re-sale prices and manufacturing costs. The United States also lost its appeal under Article 9:4 of the AD Agreement, concerning the consistency of its rules on calculating an AOR.<sup>256</sup> However (as discussed later), the Appellate Body reversed part of the Panel’s conclusion that the DOC had violated Article 2:1 of the AD Agreement. While the DOC was wrong to exclude the home market sales that it did, its substitution of downstream sales was not legally problematic.<sup>257</sup>

As for the complainant, Japan fired back with three large rounds of its own. First, Japan argued that the DOC had not made a fair comparison when, in calculating Normal Value, it used downstream sales made by the affiliate of an investigated exporter to independent purchasers.<sup>258</sup> That, said Japan, was a violation of Article 2:4 of the AD Agreement. The shot missed the mark, as the Appellate Body found the factual record insufficient to evaluate the Japanese argument.<sup>259</sup>

Second, Japan argued that the Panel had erred in finding that the United States rules on captive production were consistent with Articles 3:1-2, 3:4-6, and 4:1 of the AD Agreement.<sup>260</sup> On this point, the United States scored a victory, as the Appellate Body upheld the Panel’s finding that there was no *prima facie* inconsistency between American AD rules on captive production and the AD Agreement. But Japan also scored a victory here. The Appellate Body distinguished between the captive production rules as such, on the one hand, which were consistent with the AD Agreement, and the application of those rules, on the other hand. The Appellate Body found the way in which the DOC applied its captive production rules to be inconsistent with Articles 3:1 and 3:4 of the AD Agreement.<sup>261</sup>

The third Japanese round was fired at the causation analysis rendered by the USITC.<sup>262</sup> Japan argued that the Panel was wrong in saying that the USITC had demonstrated, satisfactorily under Article 3:5 of the AD Agreement, a causal relationship between dumped imports and material injury to the American hot-rolled steel industry. Here, the result also was mixed.<sup>263</sup> The Appellate Body reversed the Panel’s finding that the USITC had demonstrated the existence of a causal relationship between dumping and material injury. That reversal favored Japan. However, the Appellate Body also ruled that the factual record was insufficient to

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255. *Id.* ¶ 240(a)-(b).

256. *Id.* ¶ 240(c).

257. *Id.* ¶ 240(d)-(e).

258. *Id.* ¶ 49(f)(v).

259. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, at ¶ 240(f), (i).

260. *Id.* ¶ 49(d).

261. *Id.* ¶ 240(g).

262. *Id.* ¶ 49(e).

263. *Id.* ¶ 240(h).

allow for a complete analysis of Japan's causation claim. That was a small victory for the United States.

#### 9. Using Facts Available and Applying Adverse Facts<sup>264</sup>

One can almost sense the mystification on the part of the American side on the facts available issue. The United States argument was simple: a deadline is a deadline. NSC and NKK had 87 days to respond to the questionnaires, well more than the 30 days mandated by Article 6:1:1 of the AD Agreement, and thus surely reasonable. These respondents gave the DOC weight conversion factors on February 23, 1999—long after the December 21, 1998, and January 25, 1999, deadlines for the original and supplemental questionnaires. The United States argued that Article 6:8 of the AD Agreement allows an investigating authority like the DOC to set deadlines for submission of data that, if not met, entitle the authority to turn to facts available. Paragraph 3 of Annex II to the AD Agreement elaborates on Article 6:8 by setting three criteria for the use of information submitted by respondents: (1) the information must be submitted in a timely fashion (*i.e.*, before the expiry of a deadline); (2) it must be verifiable; and (3) it must be usable without undue difficulty.

What the Panel did, said the United States, was ignore the timeliness criterion and thereby read the whole topic of deadlines out of the Article 6:8-Annex II scheme. If that slack approach is taken, then how, queried the United States, could an investigating authority set and enforce a reasonable deadline? How, in turn, could AD cases proceed expeditiously? As one American trade lawyer put it, the Panel's finding "basically makes the statute in question unworkable."<sup>265</sup>

The American argument would seem to be a winning one, especially to lawyers concerned about efficient adjudication, maintenance of transparent rules, and upholding the rule of law. Yet, the Appellate Body left undisturbed the Panel's finding, thus upholding Japan's claim that the DOC indeed had violated Article 6:8 and Annex II. It did not challenge the points made by the United States, and in fact conceded that even though Article 6:1:1 did not use the word "deadline," it was quite obvious from the first sentence of that provision that it was entirely appropriate for an investigating authority to set a 30-day minimum time-limit, otherwise interested parties would wind up controlling a case.

Rather, reasoned the Appellate Body, the defect in the American argument was that it championed the first sentence of Article 6:1:1 over the second sentence of that provision. The second sentence requires an investigating authority to extend a time-limit for response where cause is shown to do so and where the extension is

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264. For a discussion of the use of facts available with respect to NSC and NKK, and the interpretation of "reasonable," see *id.* ¶¶ 73-90. For a discussion of the application of adverse facts to Kawasaki, see *id.* ¶¶ 96-110.

265. Quoted in Daniel Pruzin, *Japan and U.S. Each Claim Win in WTO's Hot-Rolled Steel Ruling*, 18 Int'l Trade Rep. (BNA), at 398, 399 (Mar. 8, 2001).

practicable. Put differently, the first sentence would be an immutable—and, therefore, harsh—deadline rule, but for the second sentence. It is the second sentence that allows for flexibility in the process of responding to questionnaires, which sometimes is needed in an investigation. Overall, Article 6:1:1 does not yield an absolute answer as to when an investigating authority must reject responses to a questionnaire.

For insight into that problem, the Appellate Body said that it was necessary to view all the relevant provisions of the AD Agreement together—Articles 6:1:1 and 6:8 and Annex II. Reading the first sentence of Article 6:8 very closely, the Appellate Body found in it two conditions, either of which must be fulfilled before reliance can be placed on facts available: the interested party must have (1) failed to submit necessary information within a reasonable time; or (2) significantly impeded the investigation. It read Annex II, paragraphs 1 and 3, as reiterating the first criterion. There was no factual basis in the case to suggest NSC or NKK had tried to block the investigation. Thus, the question boiled down to whether they had supplied the data on weight conversion factors within a reasonable time.

Moreover, said the Appellate Body, as the United States pointed out, Paragraph 3 of the Annex adds two additional criteria—that the data be verifiable and that it be usable by the investigating authority without undue difficulty. That is, Annex II, paragraph 3, lists (1) timeliness, (2) susceptibility to verification, and (3) usability of information supplied as criteria for determining whether it is appropriate to rely on facts available. So long as a respondent offers information on time that can be verified by the investigating authority and used by it without problems, then the authority does not have the option of turning to facts available. It must use the data submitted. In a critical passage, the Appellate Body summarized its integrated reading of Annex II, and Articles 6:1:1 and 6:8:

[W]e consider that, under paragraph 3 of Annex II, investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time. In other words, we see, “in a timely fashion” in paragraph 3 of Annex II as a reference to a “reasonable period” or a “reasonable time.” This reading of “timely” contributes to, and becomes part of, the coherent framework for fact-finding by investigating authorities. Investigating authorities *may* reject information under paragraph 3 of Annex II only in the same circumstances in which they are entitled to overcome the lack of this information through recourse to facts available, under Article 6:8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*. The coherence of this framework is also secured through the second sentence of Article 6:1:1, which requires investigating authorities to extend deadlines “upon cause shown” if “practicable.” *In short, if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6:1:1 calls for the extension of*



*the time-limits for the submission of information.*<sup>266</sup>

In the facts of *Hot-Rolled Steel*, there was no allegation that the weight conversion factors could not be verified. Quite the contrary, the DOC verified NKK's factor. There also was no allegation that the DOC could not use the factors submitted by NSC or NKK. Thus, again, the issue boiled down to whether they had submitted the factors in a timely manner. The last sentence of the above-quoted passage foretells why Japan prevailed on its claim on appeal.

In that sentence, the Appellate Body was careful to avoid clearing up ambiguity surrounding the word "reasonable." In effect, the ambiguity is deliberate and serves a strategic purpose—it gives investigating authorities the flexibility they need. Hence, said the Appellate Body, what is a "reasonable period" under Article 6:8 and paragraph 6 of Annex II of the AD Agreement, or a "reasonable time" under paragraph 1 of Annex II, necessarily "should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation."<sup>267</sup> At the same time, the Appellate Body did its job of interpreting the strategically ambiguous language by suggesting six criteria by which an investigating agency could judge whether information, handed in after a deadline, still could be said to be submitted in a "reasonable" period of time. Otherwise, the ambiguity could be exploited strategically in the wrong way – by the respondent as a license to disregard time limits, which in turn would vitiate efforts to conduct AD investigations efficiently and fairly. The factors the Appellate Body identified were:

- (1) *Type and Volume* – the nature and quantity of the information submitted;
- (2) *Difficulties Experienced* – the problems incurred by the respondent in gathering the information;
- (3) *Verifiable and Usable* – the extent to which the information is verifiable by the investigating authority, and is usable by the authority;
- (4) *Prejudice to Others* – whether another interested party would be prejudiced if the information is used;
- (5) *Delay in Investigation* – whether the investigating authority would be unable to conduct the investigation expeditiously if it accepted the information; and
- (6) *How Late* – the number of days after the deadline the respondent submitted the information.<sup>268</sup>

What is patently clear from this list, and what the Appellate Body courageously

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266. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 83 (emphasis on "may" in original; emphasis on last sentence added).

267. *Id.* ¶ 84.

268. *Id.* ¶ 85.

admitted, was that ambiguous language calls for some judicial interpretation, but not judicial activism. In its own words, the Appellate Body read Articles 6:1:1 and 6:8 and Annex II of the AD Agreement “together as *striking and requiring a balance* between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.”<sup>269</sup> In other words, the judges of Geneva were cast in the role of creating a balancing test and applying it.

Why, then, was the DOC wrong in determining that the submission by NSC and NKK was not within a “reasonable” time? Why was it wrong in failing to extend the time-limit for submission? In its appellate argument, the United States had over-focused on the 30-day deadline mentioned in the first sentence of Article 6:1:1 and, in consequence, saw the rejection of untimely information as essentially mandated. In fact, a holistic view of Articles 6:1:1 and 6:8, and Annex II was how to read the text, and the result was that rejection was a last resort under rather extreme circumstances.

The DOC had rejected the NSC and NKK weight conversion factors for one, and only one, reason: they were made after the deadline expired. The DOC assumed that this exclusive fact was a sufficient basis on which to rule that the data was not submitted with a “reasonable” period. Not good enough, said the Appellate Body. The DOC ought to have inquired into the other five factors. That narrow approach injected intransigence into the intentionally flexible word “reasonable.” Yes, the DOC could have rejected the weight conversion factors as untimely, but not for the sole reason that they were submitted after the deadline. In brief, the Appellate Body was toeing the line between the law and the facts; it was not saying that the DOC was factually incorrect. Rather, it was saying that the DOC had not applied the correct legal criteria in analyzing the facts.

So much for the DOC’s rejection of the weight conversion factors submitted by NSC and NKK. What about its application of adverse facts to Kawasaki? On appeal, the American argument was simple: the factual record supported the DOC finding that Kawasaki had not been cooperative in providing information about the re-sale prices charged by California Steel for subject merchandise, and about the manufacturing costs of California Steel. The United States thundered that as a 50-50 JV parent, Kawasaki steel could have sought the assistance of its Brazilian partner, Companhia, and it could have exercised contractual rights under the JV agreement (that is, the shareholder’s agreement) – both of which might have coaxed out the information from California Steel. The failure of Kawasaki to take either of these steps clearly showed it was uncooperative.

Here again, the American argument looked, at first glance, to be strong. Why should the DOC refrain from applying adverse facts when a respondent has not pursued all available lawful means for getting information? Yet, the issue—as the Appellate Body framed it—was the meaning of the word “cooperate” in paragraph 7 of Annex II of the AD Agreement. Once again, the Appellate Body saw itself as a balancer, as responsible for constructing and applying a test that balanced the

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269. *Id.* ¶ 86 (emphasis added).

interests of investigating authorities and respondent producer-exporters in the face of an ambiguous legal text.<sup>270</sup> The Appellate Body did the balancing by looking at the dictionary and by examining two other provisions in Annex II.

As for the lexicographic analysis, the Appellate Body applauded (subtly, but unmistakably) the Panel's use of the common meaning of "cooperate," namely, to work together toward a common goal. That definition (from *The New Shorter Oxford English Dictionary*) made clear that cooperation is a process that may or may not lead to a successful outcome.<sup>271</sup> Just because the information requested by an investigating authority is not produced does not mean the respondent has failed to cooperate. It might have cooperated heroically, yet still not have been able to get what the authority wanted. To "stick" the respondent with unfavorable facts available in that circumstance would pervert the meaning of "cooperate." The Appellate Body might well have added that applying adverse facts in this context would be unjust and might create a disincentive to cooperate (in that no respondent would even bother unless it knew it could get the information, because if it could not, then it was in a "Catch-22" position).

As for the related textual provisions, paragraphs 2 and 5 of Annex II of the AD Agreement shed light on the meaning of "cooperate" in paragraph 7. Paragraph 7 does not designate a threshold, or degree, of cooperation necessary and sufficient to be deemed a cooperative respondent, and thus avoid a less favorable outcome due to the use of adverse facts available. But, paragraphs 2 and 5 plug this gap. Paragraph 2 embodies a general principle of good faith in international law. It obligates an investigating authority to be measured in the kind of cooperation it seeks. On the one hand, the authority can ask for responses in a particular form (like computer tape). On the other hand, it cannot impose an unreasonable extra burden on respondents. Paragraph 5 prohibits an investigating authority from discarding information that is "not ideal in all respects," as long as the respondent supplying the information acted "to the best of its ability." That means, said the Appellate Body, that the threshold for cooperative behavior is high—the respondent must have tried its best. The Appellate Body might well have added that the threshold is subjective, in that the focus is not on a hypothetical reasonable respondent, but on what could, and could not, have been expected of the individual respondent in the case. Taken together, said the Appellate Body, paragraphs 2 and 5—along with the dictionary definition of cooperation as a process that is not outcome-determinative—"reflect[] a careful balance between the interests of investigating authorities and exporters."<sup>272</sup>

Here, then, was the balance to be struck, ruled the Appellate Body. An investigating authority is "entitled to expect a very significant degree of effort—to the

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270. *Id.* ¶ 102.

271. *Id.* ¶ 99. The Appellate Body found this definition embedded in Article 6:13 of the AD Agreement, which requires an investigating authority to consider any difficulties experienced by a respondent in getting information, and to provide any assistance it can to the respondent. *Id.* ¶¶ 103-104.

272. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 102.

'best of their abilities'—from investigated exporters."<sup>273</sup> But, it is "not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters."<sup>274</sup> The DOC's approach to Kawasaki had erred on the side of absolutism and unreasonableness. The facts were that: (1) Kawasaki did not know of or possess the requested information; (2) the information was about the prices and costs of California Steel and known only to and possessed by California Steel; (3) Kawasaki made several attempts to obtain the information and explained its difficulties in getting it to the DOC; and (4) the DOC offered no help to Kawasaki whatsoever, and it did not approach California Steel directly. For the DOC to call Kawasaki uncooperative was a bastardization of the meaning of "cooperate." What the DOC really was doing was defining "cooperate" as the exhaustion of all legal means at hand. The Appellate Body concluded, in full support of the Panel, that this was well beyond any reasonable construction of the obligation to cooperate in Annex II, paragraph 7, of the AD Agreement.

#### 10. Calculating Normal Value: The All-Others Rate<sup>275</sup>

The United States appealed the Japanese victory at the Panel stage on Article 9:4 on a straightforward ground: the Panel had utterly mis-read Article 9:4 of the AD Agreement. Its mis-reading meant that any dumping margin calculation that is based, even in very small part, on facts available, cannot be used to compute an AOR. That, urged the United States, would be absurd. The right way to read the phrase in Article 9:4, "margins established under the circumstances referred to in paragraph 8 of Article 6," was that only a margin calculated entirely on the basis of facts available must be excluded from the weighted average of individual margins used for the AOR. Specifically, for an individual margin to be excluded from the weighted average, both elements in the dumping margin—Normal Value and Export Price (or Constructed Export Price)—had to have been based on facts available. If just one of these elements was based on facts available, *i.e.*, the individual margin was drawn only in part from facts available, then the margin could be used to calculate the AOR.

What was wrong with the American way of reading Article 9:4 of the AD Agreement? Simply put, two things. First, the Americans defined "circumstances" too narrowly. Second, they were trying to insert a modifier into the text that does not exist. Both reasons bespeak the Appellate Body's near-consistent approach to Uruguay Round texts: an exegesis, that is, a scrupulous reading of the plain meaning of the text, as called for by the Vienna Convention on the Law of Treaties.<sup>276</sup>

First, the Appellate Body considered what "circumstances" are contemplated in Article 9:4 by reference to Article 6:8. It said that they were any instance in which

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273. *Id.*

274. *Id.* (emphasis added).

275. The discussion is drawn from *id.* ¶¶ 113-130, 241.

276. *See* Vienna Convention, *supra* note 58.

facts available had to be used to provide some, or all, of the necessary information to calculate a dumping margin. That is, the “circumstances” are not confined to investigations where all of the information comes from facts available. They include cases where an entire margin is based on facts available, and cases where part of the margin (for example, just Normal Value, or just Export Price) is based on facts available. In either instance, the cause of the “circumstances” may be that the respondent cannot or will not provide information within a reasonable period. Thus, the Appellate Body concluded that the Panel was quite right to interpret the Article 6:8 “circumstances” to include an AD investigation in which recourse is made to facts available for only a small amount of data to complete the calculation of a dumping margin for an individual producer-exporter. In turn, that margin must not be included in the weighted average calculation of an AOR. In brief, any use of facts available—even a little bit—is enough to taint an individual dumping margin and thereby vitiate that margin for purposes of calculating an AOR.

Second, the Appellate Body held that the United States was misreading the language of Article 9:4 of the AD Agreement—“margins established under the circumstances referred to in paragraph 8 of Article 6”—as if the adverb “entirely” (or “exclusively” or “wholly”) exists in front of the word “established.” There is no such modifier in the text. The motive of the United States was obvious: that modifier does exist in its domestic statute, 19 U.S.C. Section 1673d(c)(5). In turn, the United States wanted to constrict the Article 9:4 warning about the ceiling on an AOR—that the calculation of the AOR must exclude individual margins based on facts available only if the facts available are the exclusive source of data. But, Article 6:8 covers full or partial reliance on facts available. Hence, the Article 9:4 warning to exclude individual margins from a weighted average applies whether full, or partial, recourse is made to facts available. In brief, the text is more open-ended than the United States argued.

Interestingly, while the Appellate Body could have stopped at this point, it did not. It found a third reason for rejecting the American argument, a reason grounded not on the language of the text *per se*, but on the purpose behind the text and the connected concern of equity.<sup>277</sup> In articulating that purpose, the Appellate Body emerged from its careful exegesis and openly donned the robes of common law judges. Article 6:8 of the AD Agreement was all about remedying gaps in the record caused by respondents that were individually investigated but were unhelpful or recalcitrant as to supplying data. For those respondents, paragraph 7 of Annex II condoned calculation of a dumping margin that was less favorable to them than would otherwise occur.

But, queried the Appellate Body, what about producer-exporters that were not investigated? Were they not innocent, in the sense that they had neither been unhelpful nor recalcitrant? Indeed, precisely because they were not investigated, they never had the chance to supply information in the first place. Why should the uninvestigated respondents be prejudiced by the acts or omissions of an investigated

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277. See *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 123.

respondent? The Appellate Body saw Article 9:4 as the protection for these innocent respondents; because they had not been asked to cooperate in an investigation, they should not be harmed by a gap in the information supplied by the individually-investigated respondents.

Suppose, the Appellate Body asked, the American reading of the texts were accepted. Would the un-investigated respondents be adequately protected? Obviously, the answer is no. An individual dumping margin would be excluded from the computation of an AOR only if that margin had been based entirely on facts available. If it had been based in part on such facts, and in part on information supplied by an investigated respondent, then the margin would be included in the weighted average. Consequently, the un-investigated respondents would lack complete protection against having facts available used in the calculation of an AOR. The sins of an investigated respondent—in being unwilling or unable to provide some data—would be visited on them. Only in the egregious case—where both Normal Value and Export Price are derived from facts available, suggesting a grave sin by the investigated respondent—would they be protected against inclusion of the individual margin. That, said the Appellate Body, was at odds with the purpose of the textual scheme. It might as well have added that it would be unfair too, because the tone of the Appellate Body's report on this matter is one of equity as well as analysis of legislative purpose. Indeed, the two are symbiotically related.

The United States did have a clever reply to the Appellate Body's third rationale. If a dumping margin based in part on facts available had to be excluded from the computation of the weighted average margin for individually-investigated respondents that was destined for use as the AOR for the un-investigated respondents, then it might be impossible to calculate an AOR. After all, many individual dumping margins were based in part on facts available. If partial use of facts available were enough to taint them, then there could be cases in which no individual margins were untainted. The Appellate Body agreed. However, the problem was a *lacuna* in the text of Article 9:4 of the AD Agreement. Moreover, the American way of reading that text did not fill the gap. The possibility that no AOR could be calculated existed even with that approach, because there could be cases in which all the individual dumping margins were based entirely on facts available. Article 9:4 simply does not say how to calculate an AOR when all of the individual dumping margins that would go into a weighted average have to be excluded from that average because they are based, wholly or partly, on facts available. The problem with the American reply was that it missed the mark. The issue of how to deal with the *lacuna* was not raised on appeal, and thus, it was outside the Appellate Body's frame of reference.

In sum, the Appellate Body held that the American statute, 19 U.S.C. § 1673d(c)(5), is inconsistent with Article 9:4 of the AD Agreement. The statute called for exclusion from the AOR calculation a dumping margin for an individually-investigated respondent only if that margin was derived exclusively from facts available. The AD Agreement called for exclusion of that margin whether derived exclusively or partly from facts available. Thus, the AD Agreement afforded broader protection to un-investigated respondents from facts available than did the American

statute. Therein lay the incongruity. What was the recommendation of the Appellate Body? The United States ought to amend its statute to conform to the AD Agreement.

What about the behavior of the DOC in practice? Was the practical application of that statute in this case also incongruous with WTO obligations? In a word, yes. The DOC had included in the AOR applied to un-investigated producer-exporters the margins of the three individually investigated respondents—Kawasaki, NSC, and NKK—that it had calculated partly from facts available. That was consistent with the American statute, which required exclusion only where full recourse was made to facts available. But, it was inconsistent with the Article 9:4 of the AD Agreement, which called for exclusion in instances of full or partial recourse. With this ruling, the Japanese won a complete victory against the American appeal of the Article 9:4 issue.

#### 11. Calculating Normal Value: Excluding Sales to Affiliates<sup>278</sup>

The United States won a partial victory in its appeal on the substantive aspects of the dumping margin calculation, *i.e.*, the calculation of Normal Value by the DOC. In brief, the Appellate Body said that it was consistent with Article 2:1 of the AD Agreement for the DOC to calculate Normal Value by excluding certain downstream sales made by the affiliates of one of the exporters subject to investigation to dependent purchasers. Interestingly, in addition, the Appellate Body reversed three other conclusions of the Panel relating to this calculation. But, on the 99.5 percent test, the United States lost.

Consider, first, the unsuccessful American appeal against the Japanese argument that the DOC's 99.5 percent test for exclusion of home-market sales to affiliates of the respondent was arbitrary and biased. The United States looked to the language of Article 2:1 of the AD Agreement and pointed out that nothing in the provision compelled a WTO Member to use the same method to decide whether different categories of sales were made in, or outside of, the ordinary course of trade. The DOC uses the 99.5 percent test to exclude low-priced sales to affiliates. Under the DOC's consistent custom and practice, said the United States, it excludes from the Normal Value calculation any sales by the respondent to an affiliated buyer that are "aberrationally high." The DOC does not automatically exclude all high sales prices to affiliates, because there is no *a priori* reason to suspect they are artificial. In contrast, the automatic nature of the 99.5 percent test for excluding low sales prices is sensible, because such sales are almost certainly tainted by the affiliate relationship between the respondent and buyer.

All this is fine, argued the United States. The large point, it argued, is that different tests for different circumstances is a permissible way of interpreting and implementing the key language in Article 2:1 of the AD Agreement—"sales in the

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278. The discussion is drawn from *id.* ¶¶ 136-158.

ordinary course of trade.” That phraseology is sufficiently supple to allow an investigating authority to employ one test (99.5 percent) for one reason why a respondent’s home-market sales might be outside the ordinary course (low prices), but another test (“aberrationally high”) for another reason (high prices). In effect, the United States was accusing the Panel of substituting its own rendition of the meaning of the language and, therefore, vitiating the inherent flexibility in the text.

The Appellate Body did not accept the American argument, yet it also was not entirely happy with the Panel’s rationale (such as it was). The Appellate Body affirmed that Japan was right about the 99.5 percent test running afoul of Article 2:1 of the AD Agreement, but the reason for the inconsistency was not quite captured by the Panel. The starting point in thinking about the problem, said the Appellate Body, is to realize that the concept of “ordinary course” is a multi-dimensional one. It is about more than just price. Sales prices to an affiliate may be high or low, in comparison with some benchmark, but “[p]rice is merely one of the terms and conditions of a transaction.”<sup>279</sup> Other factors, like volume, liabilities undertaken (*e.g.*, for transportation and insurance), and so forth will affect the price itself, and more generally the evaluation of whether a sales transaction is in the “ordinary course.” Even to the extent that affiliation is not dispositive, entirely dependent companies (*e.g.*, a wholly owned subsidiary of a parent) might engage in arm’s length sales transactions.

The Appellate Body did not feel any need to establish all the circumstances that define “ordinary course” sales. Clearly, it wanted to be cautious and not fashion a sweeping judicial test for the ambiguous language of Article 2:1 of the AD Agreement if it could avoid doing so. Equally clear, however, was its desire to straighten out the reason for finding fault with the DOC’s work. The essence of the fault was the uncorrected bias in the DOC’s calculation. In general, including lower-priced transactions between affiliates in the calculation of Normal Value would make a finding of dumping less likely and also would lower the amount of any dumping margin. That would help the respondent producer-exporter. Conversely, including higher-priced transactions in the calculation of Normal Value would result in a higher figure, thus making a finding of dumping more likely and raising the amount of any dumping margin. That would redound to the advantage of the petitioner. The DOC did the former, but not the latter. The fault that the DOC committed was that it excluded automatically lower-priced transactions based on its 99.5 percent test, but did not exclude the essentially same kind of automaticity of the higher-priced transactions. Hence, the DOC’s calculation of Normal Value was distorted in violation of Article 2:1 of the AD Agreement.

Quite logically, the Appellate Body read Article 2:1 of the AD Agreement to require exclusion of all sales not made “in the ordinary course of trade,” whether they were at prices too high or too low. The language of that Article applies to any sale, including any sale from a respondent producer-exporter to its affiliate, whether made at a price that is lower or higher than the “ordinary course.” At the same time, the

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279. *Id.* ¶ 142.



Appellate Body acknowledged that there were a large variety of potential types of transactions that could be outside of the ordinary course. (For example, as suggested by Article 2:2:1, sales between any two parties that are made below the cost of production may be outside the ordinary course of trade.) Accordingly, it did not insist on application of exactly the same rule to scrutinize every category of sale that might be outside the ordinary course.<sup>280</sup> Article 2:1 did not forbid the use of one test to verify whether a low-priced affiliated sale was in the ordinary course of trade, and a different test to verify whether a high-priced sale was in the ordinary course.<sup>281</sup> Certainly, an investigating authority needed discretion, and the AD Agreement gave it that.

But, the discretion was not unlimited. An investigating authority must use its discretion in “an *even-handed* way that is fair to all parties affected by an anti-dumping investigation.”<sup>282</sup> Any general rule adopted by an authority to prevent the distortion of Normal Value as a result of sales to affiliates “must reflect, *even-handedly*, the fact that both high and low-priced sales between affiliates might not be ‘in the ordinary course of trade.’”<sup>283</sup> The DOC was not even-handed in its tests for affiliated sales; it did not take equal account of low- and high-priced sales to affiliates.

To be precise, did the Appellate Body see the 99.5 percent test, versus the “aberrationally high” test, as not even-handed? The very monikers of the tests suggest the answer. The DOC focused too much on excluding low-priced sales that would distort Normal Value by depressing it, but not enough on excluding high-priced sales that would distort that Value by inflating it. The DOC’s 99.5 percent was a “bright-line” test for excluding from the calculation of Normal Value low-priced sales between affiliates. Sales transactions from a respondent producer-exporter to an affiliate would be included only if the weighted average price of those sales was within 0.5 percent (downward, *i.e.*, 99.5 percent or more) of the weighted average sales price to all non-affiliates. (Put conversely, a potentially large number of sales were excluded because few were likely to fall within the narrow 0.5 percent band.) Moreover, the DOC evaluated all affiliated sales transactions by this test, and it assumed that sales outside the 99.5 percent band were outside of the ordinary course of trade. Thus, the DOC afforded no opportunity for a respondent to show that sales falling outside the range (*i.e.*, deviating by more than 0.5 percent downward, such as 98 percent of the weighted average of non-affiliated sales) still were in the ordinary course of trade. In brief, the whole process of decision-making was automatic in nature.

In contrast, the DOC assumed that high-priced sales from a respondent producer-exporter to its affiliate are to be included in the calculation of Normal Value, unless the respondent showed these sales were made at aberrationally high prices. Yet, the

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280. *Id.* ¶ 146.

281. *Id.* ¶ 154 n.113.

282. *Id.* ¶ 148 (emphasis added).

283. *Hot-Rolled Steel* Appellate Body report, *supra* note 214, ¶ 148 (emphasis added).

DOC had no mathematical formula to define what price would be “aberrationally high.” The DOC excluded from the calculation of Normal Value high-priced sales between affiliates, if those sales were made at an “artificially” high price. But what, exactly, did this mean? How could a respondent know if its sale prices to an affiliate were an “aberration” or “artificial?”

Furthermore, the exclusion of high-priced sales was not done in a systematic way. The DOC neither checked nor threw out every high-priced transaction. A respondent producer-exporter would have to request exclusion of an individual transaction, and bear the burden of proving the sale price was an aberration. Thus, in theory, and probably in practice, the “aberrationally high” test meant fewer excluded transactions than the 99.5 percent test. The Appellate Body was careful to observe that putting this burden on respondents was contrary to the language of Article 2:1 of the AD Agreement. The Article put the burden of calculating Normal Value by excluding sales outside the ordinary course on an investigating authority, not a respondent.

In sum, the DOC had no guidelines, much less a standard or bright-line test, for knocking out high-priced sales between affiliates from the calculation of Normal Value. The DOC’s calculation was vigorous in excluding low-priced sales between affiliates, but not high-priced ones. To the contrary, it was rather automatic in including high-priced sales. In consequence, Normal Value was bound to be biased upwards—a boon to the petitioner. The Appellate Body asserted:

The combined application of these two rules [the 99.5 percent test for low-priced sales to affiliates, and the aberrationally high test for high-priced sales] operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales, except those proved, upon request, to be aberrationally high priced. The application of the two tests, thereby, disadvantaged exporters.<sup>284</sup>

Here, then, was the lack of even-handedness in the two tests used by the DOC. The United States was left with the faint-hearted argument that no prejudice actually resulted to exporters in the *Hot-Rolled Steel* case, because no exporter sought to avail itself of the aberrationally high test. The Appellate Body essentially sneered because the test was not published in any document, so the exporters did not know about it.<sup>285</sup> Even if they had known of the test, they still would not have had any bright-line threshold by which to decide which of their affiliated transactions were aberrations. Moreover, the Appellate Body reasoned that the theoretical possibility of a lack of even-handedness might have been enough to create prejudice to exporters. After all, if the DOC had different rules that were even-handed, then more low-priced sales

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284. *Id.* ¶ 154.

285. *See id.*

might have been included in the calculation of Normal Value, or more high-priced sales might have been excluded, and the result might have been a lower Value.

#### 12. Calculating Normal Value: Excluding Downstream Home Market Sales<sup>286</sup>

As indicated at the outset of this discussion on the appeal of the calculation of Normal Value, the United States won a partial victory. While it lost on the 99.5 percent test, it prevailed on the matter of how the DOC replaced prices from sales to affiliates with prices from downstream sales (*i.e.*, with sale prices from the first downstream sale in the home market—Japan—between the affiliates and independent buyers). This part of the appeal also involved Article 2:1 of the AD Agreement,<sup>287</sup> as well as Articles 2:4<sup>288</sup> and 6:10.<sup>289</sup> The United States disagreed with the Panel's holding that downstream sale prices could not be used in the calculation of Normal Value (whereas, given the express permission in Article 2:3, they could be employed to compute Export Price). In making this argument, and persuading the Appellate Body to reverse the Panel's holding, the United States went back to the first paragraph of Article 2.

The United States characterized sales by affiliates of a respondent to the first independent buyer as sales of a foreign like product in the ordinary course of trade for consumption in the exporting country. That characterization conforms with the language of Article 2:1 of the AD Agreement. Put conversely, the United States argued that nothing in the Article bars an investigating authority from using these downstream sales to calculate Normal Value. Specifically, the provision does not impose any limitation on who must make the sales for consumption in the respondent's home market. To the contrary, what Article 2:1 prevents is the use of sales not in the ordinary course of trade, such as sales by a respondent to an affiliate.

Japan accepted most of the American characterization: (1) downstream sales were made in the ordinary course of trade; (2) they were sales of a like product; and (3) that product was being consumed in Japan. The essence of the disagreement between the United States and Japan concerned the seller. Japan read Article 2:1 of the AD Agreement to contain an implicit requirement that only sales made by a party being investigated could be used in the calculation of Normal Value. That is, only sales by the respondent producer-exporter, for which a dumping margin was being computed, could be included. In the case at bar, no margin was being calculated for affiliates of the respondents. Therefore, countered Japan, it was unlawful to use sales made by these affiliates to autonomous third-parties. On the basis of a close reading of Article 2:1, the Appellate Body said Japan was wrong.

Basing its reasoning on the text of Article 2:1 of the AD Agreement, the

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286. The discussion is drawn from *id.* ¶¶ 161-180.

287. *See supra* note 230 and accompanying text (quoting art. 2:1).

288. *See infra* note 290 and accompanying text (quoting art. 2:4).

289. *See supra* note 225 and accompanying text (quoting art. 6:10).

Appellate Body saw four simple requirements for including a home-market sales transaction in the calculation of Normal Value. The sale must be: (1) “in the ordinary course of trade,” (2) of a “like product,” (3) “destined for consumption in the exporting country,” and (4) at a price that is “comparable.” As the United States pointed out, the text says nothing about who the parties to the sales transaction must be. Hence, there is no express mandate in Article 2:1 that the sale must be made by the respondent producer-exporter for which a dumping margin is being calculated. Conversely, there is no clear preclusion of downstream sales. Japan was wrong to read into Article 2:1 a condition about the identity of a seller when the text was, in fact, silent on the point. All that matters is whether the four requirements are met. In this case, concluded the Appellate Body, the downstream sales of hot-rolled steel from the affiliates of the respondents in the case to the first independent buyers met all four criteria.

Obviously, it was the fourth criterion—whether downstream sales were “comparable” to sales made directly by the respondent—that was problematic. After all, as indicated above, the Japanese agreed that the first three criteria were met. Japan—indeed, any potential respondent country in a future AD case—surely would wonder whether the Appellate Body meant to hold that the identity of the seller is irrelevant in calculating Normal Value. If it was irrelevant, then how would comparability be gauged? The Appellate Body addressed this concern by reference to Article 2:4 of the AD Agreement. This provision states:

*A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 [i.e., where no Export Price exists, and Constructed Export Price must be used on the basis of the price at which the subject merchandise is first resold to an independent buyer], allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable*

burden of proof on those parties.<sup>290</sup>

In other words, Article 2:4 empowers an investigating authority to make various sorts of adjustments in calculating a dumping margin to ensure that prices are “comparable,” and hence that a comparison is “fair.”

The empowerment is significant, in that the range of permissible adjustments is broad. The Appellate Body pointed out that through the adjustment process an investigating authority can account for the fact that a relevant sale transaction is not made by the respondent itself, but by another party. It went so far as to opine that when an investigating authority uses downstream sales to independent buyers to calculate Normal Value, it “come[s] under a particular duty to ensure the fairness of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison.”<sup>291</sup> Yet, Article 2:4 of the AD Agreement provides the mechanism for doing this, namely, a level of trade adjustment. In sum, the Appellate Body was saying to Japan that there is neither a textual justification nor a practical need to bar the use of downstream sales in calculating Normal Value. Rather, what is called for, in all likelihood, is an adjustment. Or, in the Vienna Convention terms, in which the Appellate Body likes to think and write, the DOC’s use of downstream sales was a “permissible” interpretation of Article 2:1 of the AD Agreement.<sup>292</sup>

### 13. The Injury Determination: Captive Production<sup>293</sup>

Japan pressed its argument, unsuccessful at the Panel stage, that the captive production provision in the AD statute of the United States (19 U.S.C. § 1677(7)(C)(iv), quoted above<sup>294</sup>) was flatly inconsistent with Articles 3:1 and 3:4 of the AD Agreement and was applied by the USITC in a manner inconsistent with those provisions. The gist of Japan’s point was that the USITC was directed to

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290. AD Agreement art. 2:4, *reprinted in* HANDBOOK, *supra* note 10, at 394 (footnote omitted, emphasis added).

291. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 168.

292. *Id.* ¶ 172. Japan asked the Appellate Body to rule on its claim that in relying on downstream sales, the DOC failed to make proper adjustments, resulting in a comparison that was “apples to oranges,” and hence unfair. *Id.* ¶ 174. The Appellate Body declined to do so because the Panel had not examined it, the parties did “not agree on the relevant facts,” and “an adequate factual record” was lacking. *Id.* ¶ 180. The Appellate Body’s reference to the facts seems odd. Under DSU Article 17:6, “[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.” DSU art. 17:6, *reprinted in* HANDBOOK, *supra* note 10, at 615. Thus, the necessary and sufficient reason for declining to rule on Japan’s claim about adjustments was that the panel had not done so.

293. This discussion is drawn from *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 187-215.

294. *See supra* note 239 and accompanying text.

“focus primarily” on the merchant market, resulting in an injury determination that was neither objective (contrary to Article 3:1) nor covered all relevant economic data (contrary to Article 3:4). Rather, the USITC’s examination dwelled on the segment of the domestic hot-rolled steel industry most likely to be injured by imports. Put differently, Japan told the Appellate Body that the Panel had misunderstood the American statute, to the effect that the words “focus primarily” in it were far more pernicious than the Panel thought.

Japan won a partial victory. The Appellate Body did not find the American statute to present a *prima facie* incongruity with the AD Agreement. But, it did hold that the USITC had applied the captive production statute in a manner inconsistent with Articles 3:1 and 3:4 of the AD Agreement. This finding was a convenient one, however correct it might be. The Appellate Body did not recommend a change to the American statute, which would have raised howls from many quarters in Congress. Rather, it simply said that in the *Hot-Rolled Steel* case, the USITC had used the statute in a way that was not consistent with United States’ international legal obligations.<sup>295</sup>

In reaching this conclusion, the Appellate Body read into the text of Article 3:1 of the AD Agreement—specifically, into the words “objective examination”—a requirement of good faith.<sup>296</sup> Indeed, in footnote 141 of its report, it characterized this requirement as pervasive in the AD Agreement. “In short,” wrote the Appellate Body, “an ‘objective examination’ requires that the domestic industry, and the effects of dumped imports, be investigated in an *unbiased manner, without favouring* the interests of any interested party. . . .”<sup>297</sup> This obligation is elaborated in Article 3:4, namely, through the illustrative list of variables to be studied in an injury determination and via the commandment to check “all relevant economic factors.” Because the list is not exclusive and the commandment is general, the Appellate Body inferred that it is entirely reasonable for an investigating authority to identify “other factors” to examine.

One such factor could be “an evaluation of particular parts, sectors or segments within a domestic industry”<sup>298</sup>—a factor looked at by the Panel in the *Mexico – HCFS* case,<sup>299</sup> which the Appellate Body cited approvingly in footnote 144 of its Report. The Appellate Body said that “a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole.”<sup>300</sup> Thus,

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295. Interestingly, in coming to this conclusion, the Appellate Body relied on some of its previous AD opinions, including *Thailand Steel*. See, e.g., *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 192 (referring to *Thailand Steel* for the proposition that Article 3:1 of the AD Agreement is an “overarching provision” that sets forth a “fundamental, substantive obligation.”).

296. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 193.

297. *Id.* (emphasis added).

298. *Id.* ¶ 195.

299. See *supra* note 210 and accompanying text.

300. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 195.

nothing in the *Anti-Dumping Agreement* prevents the United States from directing its investigating authorities to evaluate the potential relevance of the structure of a domestic industry, and, in particular, the importance to that industry, as a whole, of the fact that the production of certain domestic producers is captively consumed, while the production of other domestic producers competes directly with imports in the merchant market. Indeed, we believe that it may be highly pertinent for investigating authorities to evaluate the relevance of the fact that a significant proportion of the domestic production of the like product is shielded from direct competition with imports, and that the part of the domestic industry that is most likely to be affected by the imports is limited to the merchant market.<sup>301</sup>

A sectoral analysis *per se* does not mean that the examination fails to be objective. What matters, overall, is that the investigating authority does not conduct the study in a way that makes it more likely to find injury. The Appellate Body laid out what it envisioned, in terms of methodology: a decision by an investigating authority as to the relevant economic factors bearing on the state of the domestic industry, an evaluation of the importance of each factor, and the attachment of a weight to each factor.

In contrast to Japan, the Appellate Body obviously was not troubled by the words “focus primarily” in the American AD statute. The Appellate Body paid due deference to the interpretation rendered by American authorities of those words, observing that it is neither the Appellate Body’s nor a panel’s role to interpret the domestic legislation of a WTO Member, though both adjudicators must assess WTO consistency of such legislation. The Appellate Body was satisfied with the following arguments made by the United States about interpreting the key words in rebuttal to the Japanese claim.

First, the captive production statute has not been used frequently, so its meaning has yet to be determined in a definitive way. In fact, in the underlying AD action, the six USITC commissioners took different views as to the threshold criteria for applying the statute. Three said it was applicable, and three others said it was inapplicable. Second, the captive production provision calls upon the USITC to concentrate its examination chiefly, or in the first instance, on the merchant market segment of a domestic industry. But, it hardly directs it to do so to the exclusion of all other factors, and it does not even instruct the USITC as to the weight it must or ought to put on the merchant market. Rather, the “focus primarily” language amounts to an analytical tool provided to the USITC by the statute so as to (potentially) enhance the quality of the injury determination. Third, the statute allows for a comparative analysis—indeed, for a juxtaposition—of the relative performance of the merchant and captive market producers. Fourth, the captive production statute cannot

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301. *Id.* ¶ 198.

be read in a vacuum. Other provisions in the AD law of the United States make clear that the USITC must examine the condition of the entire domestic industry. These statutes include 19 U.S.C. §§ 1673d(b)(1) and 1677(7)(B)-(C), which implicitly contemplate an examination of the state of the petitioning domestic industry as a whole.<sup>302</sup> In sum, the United States argued, and the Panel agreed, that the captive production was not *prima facie* inconsistent with Articles 3:1 and 3:4 of the AD Agreement.

What, then, was the problem? As intimated earlier, the Appellate Body found fault with how the USITC applied the captive production in the case at bar. The USITC did not use the discretion afforded to it by the captive production statute in an objective way because it focused exclusively on the captive production market. While it compared data on that segment with aggregate industry data, it did not examine any other segment:

[T]his requirement [of Article 3:1 of the AD Agreement, to engage in an “objective examination”] means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. . . .

Moreover, by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry. For instance, we can envisage that an industry, with two parts, may be overall in mild recession, where one part is performing very poorly and the other part is performing very well. It may be that the relationship between the two parts is

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302. See HANDBOOK, *supra* note 10, at 1155, 1204-05.



such that the healthier part will lead the other part, and the industry as a whole, out of recession. Alternatively, the healthy part may follow the other part, and the industry as a whole, into recession.

...

[Accordingly,] investigating authorities cannot examine parts of a domestic industry on a selective basis. Rather, if those authorities examine one part of a domestic industry, they must examine, in like manner, all the other parts of the industry, or, in the alternative, provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts. . .

[W]hile the USITC Report includes frequent reference to data for the merchant market, it does not contain, describe, or otherwise refer to, data for the captive market. At the oral hearing, the United States confirmed that the USITC did not include in its Report “a separate discussion” of the captive market. . . .

It is true, as the United States argues, that the *aggregate* data for the industry as a whole includes data for every part of the industry. However, without further analysis to *disaggregate* this [*sic*] data, the data relating to the captive market remains [*sic*] unknown. Moreover, the mere fact that the *aggregate* data for the industry as a whole includes data for every part of the industry does not overcome the fact that the USITC Report discloses no *analysis* of the significance of the data for the captive market. Thus, there is no explanation by the USITC of the state of the part of the domestic industry that is shielded from direct competition with imports, nor any explanation of the significance of that shielding for the domestic industry as a whole. Further, the USITC Report does not exhibit any “comparative analysis” or “juxtaposition” of the merchant and the captive markets which, the United States said, is precisely contemplated by the captive production process.<sup>303</sup>

In brief, Articles 3:1 and 3:4 of the AD Agreement do not authorize an investigating authority to examine only one segment of the petitioning domestic industry, without examining the other parts of that industry, or without explaining why a sector-by-sector analysis is unnecessary. The United States captive productive

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303. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 204-205, 211-213 (emphasis on “aggregate” and “disaggregate” in original, other emphasis added).

statute allows the USITC to engage in a sectoral analysis, and even to “focus primarily” on the merchant market. That kind of analysis, and that focus, are not inconsistent in theory with Articles 3:1 and 3:4, but they may be so in practice if the USITC puts one industry segment under its microscope, but not the other segments. Like or comparable investigatory treatment must be accorded to all the segments, which the USITC failed to do by examining the merchant market but not the captive market.

#### 14. Causation<sup>304</sup>

Japan’s victory on its appeal of its causation claim was partial. The Appellate Body held that the factual record was insufficient to allow for a complete analysis of Japan’s causation claim. At the same time, the part of the appeal Japan did win was noteworthy. The Appellate Body overturned the Panel’s legal interpretation of Article 3:5 of the AD Agreement, namely, that the USITC had demonstrated the existence of a causal relationship between dumping and material injury. Why?

As observed above, the Panel based its interpretation of the non-attribution language of Article 3:5 on the 1994 GATT Panel Report in *United States – Atlantic Salmon Anti-Dumping Duties* and on the Appellate Body Report in *Wheat Gluten*.<sup>305</sup> Both are rather odd precedents to cite. The GATT Panel Report pre-dates the entry into force of the Uruguay Round AD Agreement. Indeed, among the issues in that case were various provisions of the Tokyo Round AD Code.<sup>306</sup> (To be sure, there are similarities in language between the two texts.) As to the *Wheat Gluten* dispute, it concerned the Uruguay Round Agreement on Safeguards; it was not an AD case at all. Japan argued successfully to the Appellate Body that the Panel in *Hot-Rolled Steel* had erred in its interpretation of the non-attribution language.

Perhaps Japan noticed the oddity of the Panel’s citations, but it did not seem bothered by it. To the contrary, Japan said the Panel’s error lay in its interpretation of the *Wheat Gluten* case. It was, said Japan, necessary to separate and distinguish other causal factors and to evaluate their bearing on the health of the petitioning domestic industry. The Panel was wrong in reading *Wheat Gluten* to mean there was no need for isolation of causal factors through a deduction of other variables from the overall injury to ascertain the damage done by dumped imports. Thus, Japan itself cited the Appellate Body’s *Wheat Gluten* Report and another safeguard decision of the

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304. This discussion is drawn from *id.* ¶¶ 219-236.

305. See *supra* notes 251-252 and accompanying text.

306. The dispute arose in 1991, when the Tokyo Round Code was in effect. See *United States – Atlantic Salmon Anti-Dumping Duties*, *supra* note 251, ¶¶ 1 (speaking of the “Agreement on Implementation of the General Agreement on Tariffs and Trade,” and abbreviating it as the “Agreement”), & 555 (referring to arts. 3:1, 3:2, and 3:3 of the Agreement). As the Appellate Body noted, the *Hot-Rolled Steel* Panel cited paragraph 555 with approval. See *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 218.

Appellate Body, to boot, namely, *United States – Lamb Safeguard*.<sup>307</sup>

Precisely correct, was the Appellate Body's response to Japan's argument. The Appellate Body held that the Panel was wrong to conclude that the non-attribution language of Article 3:5 of the AD Agreement does not require an investigating authority to separate and distinguish the injurious effects of other known causal factors from the damage done by dumped imports.

This provision [Article 3:5] requires investigating authorities, as part of their causation analysis, first to examine *all* "known factors" "other than dumped imports" which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports." (Emphasis added [by Appellate Body].)

The non-attribution language in Article 3:5 . . . applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. [Emphasis original.] In order that investigating authorities are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury . . . .<sup>308</sup>

The "bottom line" on causation, then, is a five-step analysis.<sup>309</sup> An investigating authority must (1) identify factors that could be causing injury to the petitioning industry, (2) check to see that these factors are operating simultaneously, (3) examine

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307. See *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/AB/R, WT/DS178/AB/R (May 16, 2001). This Report is discussed later in this Review.

308. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶¶ 222-223.

309. The Appellate Body, as quoted above, put it in terms of two steps. *Id.* ¶ 222.

all of these known factors to see if they are having an injurious effect, (4) distinguish between two categories of known factors, namely, the injurious effects of dumped imports versus the injurious effects of all other known factors, and (5) ensure that the damage done by other factors is not attributed to the dumped imports.

The Appellate Body did not leave untouched the Panel's citation to previous reports. It made clear that the Panel was wrong to follow the approach in *United States – Atlantic Salmon Anti-Dumping Duties*:

In examining the meaning of the non-attribution language, the Panel considered that the panel report in *United States – Atlantic Salmon Anti-Dumping Duties* was “relevant and persuasive” and, in fact, the Panel based its interpretive approach, in part, on a passage from that panel report which included the following statement:

... [the non-attribution language] did *not* mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have *identified the extent of injury caused by these other factors* in order to *isolate* the injury caused by these factors from the injury caused by the imports from Norway. (Emphasis added [by Appellate Body].)

It is clear to us that the interpretive approach adopted by the panel in *United States – Atlantic Salmon Anti-Dumping Duties* is at odds with the interpretive approach for Article 3:5 of the *Anti-Dumping Agreement* that we have just set forth. . . . [I]n order to comply with the non-attribution language in that provision, investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports. However, the panel in *United States – Atlantic Salmon Anti-Dumping Duties*, expressly disavowed any need to “identify” the injury caused by the other factors. According to that panel, such separate identification of the injurious effects of the other causal factors is not required.

By following the panel in *United States – Atlantic Salmon Anti-Dumping Duties*, the Panel, in effect, took the view that the USITC was not required to separate and distinguish the injurious

effects of the other factors from the injurious effects of dumped imports, and that the nature and extent of the injurious effects of the other known factors need not be identified at all. However, in our view, this is precisely what the non-attribution language in Article 3:5 of the *Anti-Dumping Agreement* requires, in order to ensure that determinations regarding dumped imports are not based on mere assumptions about the effects of those imports, as distinguished from the effects of the other factors.<sup>310</sup>

In effect, the Appellate Body was saying that the non-attribution language of the later-in-time AD Agreement, as it interpreted this language, over-ruled the GATT panel report.

Likewise, the Appellate Body took the Panel to task for mis-reading *United States – Wheat Gluten Safeguard* and not taking account of *United States – Lamb Safeguard*. Interestingly, the Appellate Body did not fault the Panel for using these cases, even though they were safeguards matters. After all, there are “considerable similarities” in the non-attribution language of Article 3:5 of the AD Agreement and Article 4:2(b) of the Agreement on Safeguards.<sup>311</sup> Both demand that injury caused to a domestic industry, at the same time, by factors other than imports not be confused with injury caused by imports. Thus, the Appellate Body very nearly congratulated the Panel for its ability to think laterally in looking to *Wheat Gluten, Lamb Safeguard*, and the Agreement on Safeguards for guidance in interpreting the non-attribution language in the AD Agreement.<sup>312</sup> The problem, said the Appellate Body, was that the Panel rode roughshod over the message of *Wheat Gluten* and *Lamb Safeguard* with respect to non-attribution. The Appellate Body quoted the passages from its Reports that the Panel ought to have read with care. These passages were unambiguous: a separation or distinction among causal factors is required in the injury determination of a safeguards case.<sup>313</sup>

### **Commentary:**

#### **1. The Adversity of Facts**

Nowhere in the AD Agreement does the term “adverse facts available” appear.

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310. *Id.* ¶¶ 225-227 (emphasis in last paragraph added).

311. This provision states that “[w]hen factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.” Agreement on Safeguards art. 4:2(b), *reprinted in* HANDBOOK, *supra* note 214, at 523.

312. *See Hot-Rolled Steel*, Appellate Body Report, *supra* note 214, ¶ 230.

313. *See id.* ¶¶ 231-232 (quoting from the *Wheat Gluten* and *Lamb Safeguard* Reports, respectively).

Rather, the term used in Article 6:8 and Annex II is “facts available.” Interestingly, the adjective “adverse” does appear in United States AD law, specifically in 19 U.S.C. § 1677e(b). There, the investigating authorities are empowered to “use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.”<sup>314</sup> The reference to “that party” is to any interested party that has failed to cooperate by not making its best efforts to comply with a request for information from the DOC or USITC. The United States explained that application of facts available, including adverse facts,

can solve the problem posed by uncooperative respondents only if it succeeds in inducing them to cooperate, and the only inducement that will persuade them to cooperate is the prospect of a worse result than if they do not.<sup>315</sup>

However, does the specific authorization under United States AD law to use adverse facts available go one step too far beyond the AD Agreement?

Japan did not make that allegation; hence, the Appellate Body could not offer an opinion. But it did not neglect the existence of the issue. In footnote 45 of its report, the Appellate Body raises the matter in an intriguing way. It suggests conscious choice of facts adverse to a respondent (or other interested party) might not be permissible under the AD Agreement. To its credit, it also presents the American explanation of the controversial adjective. Because the respondent did not offer up its own data, which no doubt would have been favorable to its case, any information provided about this non-cooperative party by the petitioner (or other interested party) surely would be adverse to the respondent. In other words, the American side dismissed any incongruity between the statute and the AD Agreement by saying that the adjective was a logical consequence of the context in which it would be relevant, not evidence of a Machiavellian anti-respondent bias or plot by investigating authorities. As WTO jurisprudence in the AD area evolves, it will be worth watching whether respondents accept this explanation.

## 2. The Quality of Argumentation

In its argument about use of facts available, the United States took an entirely reasonable, and strong, position in favor of respecting deadlines. The trap into which the United States fell was that it failed to account for the integrated and literal approach the Appellate Body tends to take in interpreting textual provisions. The United States focused on the first sentence of Article 6:1:1 and reinforced its interpretation of this sentence with a consequentialist argument about bad things that

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314. 19 U.S.C. § 1677e(b), *reprinted in* HANDBOOK, *supra* note 10, at 1239.

315. Daniel Pruzin, *WTO Issues Mixed Preliminary Ruling in U.S. – Japan Hot-Rolled Steel Dispute*, 18 Int'l Trade Rep. (BNA), at 145 (Jan. 25, 2001).

would happen if deadlines were not followed. In so doing, it did not account for the second sentence of Article 6:1:1, nor for Article 6:8 and the related Annex.

The Appellate Body summarized these provisions nicely:

Taken together, these provisions establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Article 6:1:1 establishes that investigating authorities may fix time-limits for responses to questionnaires, but indicates that, “upon cause shown” and if “practicable,” these time-limits are to be extended. Article 6:8 and paragraph 1 of Annex II provide that investigating authorities may use facts available only if information is not submitted within a reasonable period of time, which, in turn, indicates that information which *is* submitted in a reasonable period of time should be used by the investigating authorities.<sup>316</sup>

There is consequentialist logic behind the Appellate Body’s synthesis of the rules on facts available. First, in theory, no system of adjudication could survive with invariable deadlines. “Play in the joints” is as important to efficient case management as is respect for time cut-offs. Second, in practice, flexibility through phrases like “upon cause shown” and “practicable” is essential to ensure the effective participation in WTO cases of developing and least developed countries. Their companies, when respondents, may be unable to meet all of the questionnaire deadlines imposed by First World investigating authorities, even if these respondents are represented by high-price dumping lawyers in Washington, D.C. These respondent producer-exporters may not have the record-keeping systems, or the culture of rapid response, that are familiar in developed countries.

In other words, with the luxury of hindsight, the American argument was crafted too narrowly. It did not view the relevant provisions in an overall schematic way, but rather dwelled on one part of that scheme. In turn, the argument also appeared hard and insensitive. What might have ventured—though by no means can it be said with confidence that it would have succeeded—is an explanation as to why a strict position was in the interests of the WTO adjudicatory system as a whole and of the WTO’s Third World Members. The United States might have argued that failure to stress the first sentence of Article 6:1:1 of the scheme would be the first step toward undermining the certainty and predictability the AD Agreement provides through its procedures. These procedures, the United States could have argued, are a bulwark against protectionist abuse of AD laws. Also, they are a benchmark by which to appraise adherence to the rule of law in developing and least developed countries.

### 3. The Use of Precedent

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316. *Hot-Rolled Steel* Appellate Body Report, *supra* note 214, ¶ 82 (emphasis added).

On a technical point in *Hot-Rolled Steel*, the Appellate Body happily cited a precedent it had established in its *EC – Bed Linen* report. The context was the meaning of the word “margin” for purposes of adjudicating Japan’s claim under Article 9:4 of the AD Agreement. The United States argued, unsuccessfully, that both Normal Value and Export Price would have to be calculated from facts available for the resulting individual dumping margin to be excluded from a weighted average margin used for an AOR. The Appellate Body cited its *Bed Linen* report for the meaning of “margin” it had established therein.<sup>317</sup>

At first glance, the citation seems rather unnecessary. Neither Japan nor the United States worried about what “margin” meant. However, the Appellate Body knew that it was dealing with Article 9:4 of the AD Agreement and that it had defined the term in *Bed Linen* in the context of Article 2:4:2 of the AD Agreement. It seemed to want to proclaim that the meaning was the same for both provisions, even if the common definition across provisions of the AD Agreement was not made explicit in the text, and even if there was no debate about it in the case at bar. And so it did. A small bit of *obiter dicta*? Perhaps. This is more evidence of the Appellate Body working to fill gaps and plug holes in the WTO’s legal texts.

#### 4. Interpreting Domestic Law?

In its adjudication of Japan’s claim that America’s captive production statute ran afoul, both in a *prima facie* sense and in practice, of Articles 3:1 and 3:4 of the AD Agreement, the Appellate Body took pains to explain that it was not telling the United States how to interpret its own law.<sup>318</sup> The Appellate Body has a strong interest in this explanation being read and accepted; it does not want to draw upon itself any more criticism than it already is getting for infringing on the sovereignty of WTO Members. But is this explanation cogent?

At least in the context of the *Hot-Rolled Steel* case, there is reason for pause. On the one hand, the distinction is inherently difficult to draw. When is the Appellate Body clearly engaged in the interpretation of domestic law, and when is it unequivocally taking an interpretation rendered by a domestic authority and assessing that interpretation for WTO consistency? Perhaps in relatively few instances is it on one side of the line or the other. In the very act of putting an interpretation by a domestic authority to the test, the Appellate Body may, albeit unwittingly, add or detract a bit from the interpretation. The analogy to the Heisenberg uncertainty principle of modern physics may be useful—the act of measurement changes the object, however slightly.<sup>319</sup>

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317. *Id.* ¶ 118.

318. *Id.* ¶ 200.

319. See THE OXFORD DICTIONARY AND THESAURUS 1661 (American ed. 1996). The lexicographic statement of the principle is that it is impossible to determine precisely the momentum and position of a particle at the same time. See *id.*



In *Hot-Rolled Steel*, the Appellate Body stressed the view of the United States that the captive production statute allowed for a comparative analysis, or juxtaposition, of the merchant and captive markets. Because of this interpretation, the statute was *prima facie* WTO compliant. Because the USITC did not follow this interpretation, its behavior in practice was at odds with WTO obligations. Here then was the interpretative effect caused by the Appellate Body's review, highlighting what it must have thought was the correct view of the statute, and then applying that view to the facts of the case. The point, in sum, is that in assessing a domestic statute for consistency with the GATT or WTO agreements, a detailed examination of that law is ineluctable. The examination process is almost sure to cause the Appellate Body to look at how the law in question is interpreted by the WTO Member that has enacted it, and to weigh—overtly or not—different interpretations. In so doing, the Appellate Body probably cannot help affecting the very object it is measuring.

#### 5. Causation, Judicial Activism, and Protectionist Abuse

The Appellate Body spent several paragraphs in the *Hot-Rolled Steel* Report on how to conduct a causation analysis and making clear that delineating among the injurious effects of known causal factors is required by the non-attribution language of Article 3:5 of the AD Agreement. As discussed earlier, five separate steps are evident from the Appellate Body's analysis.<sup>320</sup> Does this five-step analysis mean that a WTO Member must conduct its causation analysis according to "particular methods and approaches?" Absolutely not, stressed the Appellate Body. The non-attribution language is not so specific as to compel a particular evaluation methodology. Members are free to fill in the details for themselves.

Is the Appellate Body's emphasis on this point believable? Arguably, the Appellate Body made the point in anticipation of criticism that it was infringing on the sovereignty of Members. On the one hand, it was doing its best to sketch out the obligations of Article 3:5 of the AD Agreement. On the other hand, it was trying to fend off criticism that it was micro-managing injury investigations by reading more into the Article than exists. Yet, the fact the Appellate Body clearly expects a separate identification of each known causal factor, and a distinct analysis thereof vis-à-vis dumped imports, suggests it is "judicially active." It will not tolerate a sloppy causation analysis in which the damage done to a petitioner by alternative independent variables are left fuzzy and lumped together with dumped imports. Were that to happen, the AD remedy would become susceptible to protectionist abuse.

Protectionist abuse certainly was on the minds of the Japanese. In its May 2000 "White Paper," Japan's Ministry of the Economy, Trade, and Industry ("METI") warned that countries using dumping measures were hurting themselves. On balance, these countries were racking up economic losses of 0.03 to 0.06 percent of gross domestic product ("GDP") each, owing to the higher import prices that, while helping

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320. See *supra* text accompanying note 309.

to protect domestic industries, hurt consumers and unaffiliated industries.<sup>321</sup> Japan pointed out that since 1997, steel products from not only Japan, but also twenty other countries, had been the target of either an AD investigation in the United States or of AD duties imposed by the United States.<sup>322</sup> The result was a “chilling effect” on international trade in steel.<sup>323</sup> Japan was particularly victimized, with about eighty percent of its steel products subject to an AD duty.<sup>324</sup> Its producers, such as Nippon Steel, argued that they had not intentionally boosted exports to the United States. Rather, they were simply meeting demand from American steel consumers, particularly automakers.<sup>325</sup> (Of course, as any AD lawyer knows, intent does not matter in an AD case.) The United States shot back, accusing the Japanese of masterminding a conspiratorial attack against its AD laws.<sup>326</sup> The United States had one other shot provided to it by financial market investors and analysts. Many of them charged that Japanese steel makers had not been eliminating excess capacity or investing in new businesses quickly enough and, hence, they still were struggling with high costs.<sup>327</sup>

Paradoxically, then, one could argue that the Appellate Body did not go far enough in its activism. It did not say anything about the extent of causation of each of the various known factors. What if dumped imports are not the most important cause of injury, or what if there are equally important other causes? Moreover, is it permissible to lump together all of the other known factors and weigh them against dumped imports? In brief, what remains fuzzy in the causation analysis under Article 3:5 of the AD Agreement is whether the injurious effects of dumped imports must surpass a particular threshold (50 percent, for instance).

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321. See Toshio Aritake, *Japanese Ministry's Annual Report Cites Abuse of Antidumping Measures*, 17 Int'l Trade Rep. (BNA), at 770 (May 18, 2000). Interestingly, the White Paper also indicated that Japan needs additional legal service providers to cope with disputes arising from economic de-regulation and trade liberalization. Japan has 17.0 lawyers per 100,000 people and 2.3 judges per 100,000 people, in comparison with 352.5 and 11.6, respectively, in the United States. See *id.*

322. See Daniel Pruzin, *Japan Calls U.S. Antidumping Practices "Abusive," Moves to Bring WTO Complaint*, 16 Int'l Trade Rep. (BNA), at 1783 (Nov. 3, 1999).

323. *Id.*

324. See Daniel Pruzin & Toshio Aritake, *Japan Seeks WTO Consultations with U.S. on Steel Dumping Duties*, 16 Int'l Trade Rep. (BNA), at 1915 (Nov. 24, 1999).

325. See Aritake, *Japanese Steel Mills*, *supra* note 223.

326. See Gary G. Yerkey & Toshio Aritake, *U.S. Accuses Japan of Masterminding Attack on U.S. Antidumping Laws in WTO*, 16 Int'l Trade Rep. (BNA), at 1731 (Oct. 27, 1999) (comments of David L. Aaron, Undersecretary of Commerce for International Trade). The strategy may have worked, as clarification of certain aspects of the AD law are on the agenda for the Doha Development Round; see also Bhala, *Poverty*, at I.B.

327. See Alexandra Harney, *Japan to File Protest Over U.S. Dumping Claims*, FIN. TIMES, Nov. 18, 1999, at 8.

### III. TRADE REMEDIES: SAFEGUARDS

#### A. The *Wheat Gluten* Case

##### *Citation:*

***United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*** (complaint by the European Communities, with Australia, Canada and New Zealand as Third Party Participants<sup>328</sup>) WT/DS166/AB/R<sup>329</sup>

The DSB adopted the Appellate Body Report and Panel Report, as modified by the Appellate Body Report, on 19 January 2001.

##### *Explanation:*

##### 1. Facts and Overview

*United States - Wheat Gluten Safeguard* is not a ground-breaking case in the same sense as several other decisions, such as *Argentina - Footwear Safeguard*<sup>330</sup> and *Korea - Dairy Product Safeguard*,<sup>331</sup> in interpreting the Uruguay Round Agreement on Safeguards and its relationship to Article XIX of the GATT.<sup>332</sup> *United States - Wheat Gluten Safeguard* also sidesteps the most controversial issue—whether the requirements of both the Safeguards Agreement and Article XIX of GATT must be fully satisfied by a Member imposing safeguards. However, here, as in *Argentina - Footwear Safeguard*, and in *United States - Yarn Safeguard*,<sup>333</sup> the Appellate Body was required to deal with special treatment that the Member applying the safeguards afforded to another Member party to a regional trade arrangement, in this case Canada and NAFTA. Most of the issues considered by the Appellate Body in this case, while important in defining the circumstances in which safeguards may be

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328. Presumably, Australia and New Zealand participated at least in significant part because of a then-pending case, *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand*, discussed *infra* pp. 620-33.

329. Appellate Body Report, *United States Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *Wheat Gluten Appellate Body Report*].

330. Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999); see *WTO Case Review 2000*, *supra* note 113, at 73-87.

331. Appellate Body Report, *Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R (Dec. 14, 1999); see *WTO Case Review 2000*, *supra* note 113, at 87-94.

332. For the texts of the Safeguards Agreement and the General Agreement on Tariffs and Trade, respectively, see *HANDBOOK*, *supra* note 10, at 521-30, 183 & 226-27.

333. See *supra*, p. 467.

applied, are technical or procedural issues. They are significant primarily in the sense that taken together they make it even more difficult for a national competent authority to sustain a safeguards measure, and because safeguards remain a controversial trade remedy due to their inherently protectionist nature.

The United States, in October 1997, imposed a quota on imports of wheat gluten from the EC after the usual investigation by the USITC.<sup>334</sup> However, the United States did not impose safeguards on wheat gluten from Canada, one of the United States' NAFTA partners (and a major supplier of wheat gluten to the United States), or on certain other countries, since NAFTA restricts the application of global safeguards to other NAFTA members except where the imports of the good in question "considered individually, account for a substantial share of total imports" and "contribute importantly to the serious injury, or threat thereof, caused by imports."<sup>335</sup> The safeguards action had been duly notified to the WTO's Safeguards Committee.

Both the EC and the United States appealed certain aspects of the Panel determination.<sup>336</sup>

## 2. Principal Issues on Appeal

The issues that were on appeal from the Panel report and that the Appellate Body<sup>337</sup> considered included the following:

- a. Whether the competent authority, in this case the USITC, is required to evaluate only the relevant factors listed in the Safeguards Agreement and others *clearly* raised before them by the parties, or whether it must independently investigate other significant factors, in order to meet the "all relevant factors" requirement of Article 4.2(a) of the Safeguards Agreement;
- b. The scope of the causal link between increasing imports and serious injury under Article 4.2(b) of the Safeguards Agreement;
- c. The requirements of Articles 2.1 and 4.2 of the Safeguards Agreement that Members apply safeguards globally, to all imports, in light of the exclusion of Canada from the safeguards on wheat gluten;
- d. Whether the United States met its notification obligations under Articles 8

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334. Inv. no. TA-201-68 (Dec. 1999).

335. 19 USCS § 3371(a) (2002); North American Free Trade Agreement art. 802(1), reprinted in HANDBOOK, *supra* note 10, at 669 & 752-53.

336. Panel Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R (Jul. 31, 2000).

337. *Wheat Gluten* Appellate Body Report, *supra* note 329, ¶ 44.

and 12;

- e. Issues relating to the USITC's treatment of productivity and profits and losses in finding injury, and the "protein content" of wheat;
- f. Whether adverse inferences should have been drawn as a result of the refusal of the United States to provide the Panel with certain confidential information collected by the USITC in the course of its investigation; and
- g. The refusal of the Panel, on the ground of judicial economy, to examine other European Community claims, including the contention that the USITC did not properly address the "unforeseen developments" requirement of GATT Article XIX.

### 3. Arguments of the Parties<sup>338</sup>

#### a. Causation Analysis

Article 2.1 of the Safeguards Agreement requires a demonstration that serious injury or a threat of serious injury is caused by increased imports (absolute or relative to domestic production). However, other factors, such as adverse economic conditions, high interest rates, and competitive factors, also may injure the domestic producers. One of the challenges to the competent authority, in this case the USITC, is how to deal with these other factors. The Panel had effectively determined that the USITC was required to isolate the impact of imports from each of the other factors that might result in injury to domestic producers. The United States challenged this conclusion, alleging that this is not necessary. It contended that it is sufficient for the competent authority simply to "examine other causes of injury to ensure that their effects do not sever the causal link [between imports and injury] found to exist."

The EC, in contrast, agreed with the Panel that increased imports *per se* had to cause serious injury in order for Article 4.2 of the Safeguards Agreement to be satisfied. It faulted the USITC for failing to undertake an examination "to ensure that injury caused by other factors was not attributed to imports." Australia and New Zealand agreed with the EC that the United States approach, in the words of Australia, "would effectively write the causation requirement out of the *Agreement on Safeguards*," in the sense that attributing injury to factors other than imports would destroy any connection between imports and serious injury.

#### b. Exclusion of Canada from Safeguards Measures

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338. *Id.* ¶¶ 9-43.

The United States drew a distinction between exclusion of certain countries' goods from the investigation and their exclusion from the application of the safeguard measure. For example, under Article 9.1 of the Safeguards Agreement, developing country goods must be excluded from the safeguard measure under some circumstances, but not from the investigation. This case is different from *Argentina - Footwear Safeguard*, where footwear manufactured in other Mercosur nations was excluded from the restraints, because in this case the USITC "specifically examined the contribution of Canadian imports to the serious injury sustained by the industry and found that these imports played no significant role in that injury." The Panel also ignored GATT Article XXIV and a footnote in the Safeguards Agreement as a basis for excluding partners in a free trade area from safeguards measures.

The EC believed that the Panel properly recognized that "the United States could not exclude imports from Canada on the basis of a *global* investigation concerning injury and causation that included wheat gluten *from all sources* [including Canada]." The EC argued that GATT Article XXIV does not provide a defense, and, in any event, the United States did not meet the requirements for reliance on Article XXIV of the GATT.

New Zealand argued that a free trade area may exclude its members from the application of safeguard measures, but must assure that the measures are applied to the same imports as determined to cause serious injury—i.e., there must be "symmetry." Canada, not surprisingly, disagreed. The USITC met the requirements of the Safeguards Agreement by conducting a separate investigation to determine that the imports from Canada were not contributing importantly to the serious injury.

#### c. Notification and Consultation Requirements

The issue here was the meaning of "immediate" notification of an investigation so that a Member contemplating safeguards could engage in meaningful consultations with affected Members under Articles 8 and 12 of the Safeguards Agreement. The United States contended that it provided notification and information on the contemplated measures and conducted consultations, as required by the Agreement. The European Communities argue that the timing of the United States' notification was not such as to permit meaningful discussion before the United States imposed safeguards.

#### d. Scope of Competent Authorities' Evaluation

What are the issues the competent authority is required to address in deciding whether the conditions for imposing safeguards (increasing imports, serious injury, causation, etc.) are met? May the competent authority limit its investigation to issues that are raised by the parties to the investigation undertaken under national law, or must the competent authority evaluate other factors, even if the parties to the

proceeding do not raise them? The Panel determined that only issues *clearly* raised as relevant by the parties required investigation by the USITC. The European Communities disagree. Under Article 4.2(a), the competent authority must inquire into *all* relevant facts, not just those presented by the parties.

The United States, in contrast, contended that the investigation should be limited to information that was available to the competent authority. It argued that the Panel should consider only that information, rejecting any information the government presented to the Panel that it did not present to the competent authority during the investigation.

#### e. Extent of Panel Review of Data

Under Article 11 of the WTO's Dispute Settlement Understanding,<sup>339</sup> as interpreted by the Appellate Body, a panel is required to examine all relevant facts and evidence, and to determine whether the competent authority "provided a reasoned or adequate explanation of how the facts supported the determinations that were made." In this case, the EC faulted the Panel for failing to verify the data, including the financial data and allocation methodologies related to productivity and profit and loss, upon which data the USITC relied in making its determination. In particular, the EC believed that the USITC investigation was deficient because it failed to analyze the protein content of wheat as a relevant factor, a failure that the Panel accepted. The inability of the Panel was due in part to the United States' unwillingness to provide the Panel with confidential data supplied by the parties to the USITC proceeding, and the EC believed that the Panel should have drawn adverse inferences from the failure of the United States to provide such data.

The United States argued that the Panel acted correctly in accepting the USITC report, in which the USITC in its investigation demonstrated that it had properly evaluated the relevant data. The Panel is not required under Article 11 to verify this data itself. Since the respondents did not raise the issue of protein content of wheat before the USITC, the USITC was not required to obtain additional information on this issue. Also, the Panel acted properly and within its discretion in not drawing adverse inferences, as the USITC acted consistently with Article 3.2 of the Safeguards Agreement, which governs the disclosure of confidential information by competent authorities and authorizes non-disclosure.

#### f. Judicial Economy

Given its success in convincing the Appellate Body in *Argentina - Footwear Safeguard* and *Korea - Dairy Safeguard* that a safeguard investigation must include a determination of "unforeseen developments" under GATT Article XIX, the EC faulted the Panel for declining to consider that issue. Judicial economy—declining to

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339. Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* HANDBOOK, *supra* note 10, at 602-24.

decide an issue that is not required to support the Panel's conclusion—does not justify such a refusal. The EC's concern was that the USITC might simply repeat the serious injury determination as required by the Panel and ultimately apply the safeguard measure in the same manner as earlier, without dealing with the "unforeseen developments" issue at all. The United States, of course, disagreed. The Appellate Body cannot pass on the "unforeseen developments" question because the Panel provided no findings of fact on that issue. In any event, according to the United States, the USITC was not required to make a separate finding of "unforeseen developments."

***Rationale and Holdings:***<sup>340</sup>

**1. All Relevant Causation Factors Must be Considered**

In the course of its investigation, the USITC considered all of the factors listed in Article 4.2(a), as well as wages, inventories, and prices. The issue was whether the USITC, in considering "all relevant factors," paid sufficient attention to the relationship between the protein content of wheat and the price, even though this factor was not clearly raised by the parties. The Appellate Body in effect concluded that it did. The competent authority must conduct an investigation of *all* relevant factors; the term "investigation" implies "systematic inquiry" or "careful study." Even though the parties will be the principal source of information, this does not mean the competent authorities may limit their investigation to the information thus presented if other factors are relevant. If the competent authority does not have the information in the submissions of the parties, it must find it through additional investigative steps!

However, in this case, the USITC met its burden. Its report did consider the relationship between protein content of wheat and demand for wheat gluten, thus acknowledging the possible relevance of this relationship to the state of the domestic industry. During the years of the investigation, the protein content of wheat gluten was neither particularly high nor low; thus it was not a relevant factor in the surge of imports, and the USITC was not required to evaluate it as such to meet the requirements of the Safeguards Agreement.

How does the competent authority demonstrate that increased imports *per se* (and not some other factor) are causing serious injury? Under Article 4.2, a causal link must be shown, and care must be taken not to attribute injury caused by other factors to increased imports. However, according to the Appellate Body, the causal link may exist even if at the same time other factors are contributing to the situation of the domestic industry.<sup>341</sup> "What is important in this process is separating or

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340. See *Wheat Gluten* Appellate Body Report, *supra* note 329, ¶¶ 45-188.

341. 19 U.S.C. § 2251(b)(1)(B) (2002). Under U.S. law, "the term 'substantial cause' [of serious injury] means a cause which is important and not less than any other cause." *Id.*



distinguishing the *effects* caused by the different factors [imports and factors other than imports] in bringing about the ‘injury.’” If the non-import effects are first distinguished from the effects of imports, they will not be erroneously attributed to imports. At the same time, this does not mean that increased imports on their own—“alone,” as the Panel concluded—must be capable of causing serious injury, or that injury caused by other factors must be excluded.

However, the USITC is not home free. Of the various non-import factors the USITC analyzed, it misinterpreted the impact of capacity utilization. The USITC blamed low capacity utilization on increasing imports, while there is evidence that the real reason for low capacity was an unwise expansion of domestic industry production capacity by sixty-eight percent over the period of investigation. While such increases in available capacity may not have been the sole cause of serious injury, the USITC failed to examine this factor adequately, effectively attributing (erroneously) the low capacity utilization to increased imports instead of increases in production capacity. Therefore, the USITC failed to demonstrate that this injury has not been erroneously attributed to imports.

## 2. Exclusion of NAFTA (Canadian) Source Imports was Wrong!

The USITC, it will be recalled, had included wheat gluten from all sources, including Canada, in its determination of serious injury. Then, in a “separate and subsequent investigation,” the USITC had determined that the Canadian source imports, although “a substantial share of total imports,” were “not contributing importantly to the serious injury caused by imports.” But excluding Canada from the wheat gluten safeguards is not that easy, according to the Appellate Body. The USITC failed to determine that imports from all other sources, excluding Canada, “satisfied the conditions for the application of a safeguard measure.” Consequently, there was insufficient basis for excluding Canada from the safeguards, and it was unnecessary for the Panel to determine whether GATT Article XXIV<sup>342</sup> or footnote 1 to the Safeguards Agreement<sup>343</sup> permitted such differential treatment.

## 3. “Immediate Notification” Means Just That

For the Appellate Body, “immediate notification,” as used in the Safeguards

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342. Article XXIV provides certain exceptions to Member obligations under the non-discrimination/national treatment and most-favored-nation treatment provisions of GATT for members of free trade agreements, such as NAFTA and customs unions.

343. Footnote 1 of the Safeguards Agreement discusses the use of safeguards by customs unions on behalf of all members of the union or on behalf of a single member state. It does not mention free trade areas, and the applicability of the footnote to free trade areas has not yet been determined by a WTO panel or the Appellate Body.

Agreement, means exactly that, immediate. Notification is required on initiating the investigatory process, making a finding of serious injury or threat thereof, or deciding to apply a safeguard measure. While the degree of urgency implied by “immediate” must be considered on a case-by-case basis, the time delay must be kept to a minimum, so that the Safeguards Committee has the *fullest possible period* to consider and react to an ongoing investigation. For notification to the affected foreign governments of initiation of an investigation, the “immediate” requirement of the Safeguards Agreement is definitely not met by notification only after the sixteen days taken by the United States in this case; for notification to the affected governments of a serious injury finding, twenty-six days is not “immediate.” However, notification of the Safeguards Committee within five days after implementation of the safeguards—United States practice in this instance—is immediate and therefore timely.

However, the United States failed to provide adequate opportunity for consultations prior to implementation of the safeguard measure—for a “meaningful exchange on the issues identified”—when it failed to advise the European Communities of the President’s intended decision. It was not enough to supply the information contained in the USITC report, since the latter did not provide a sufficiently precise indication of the intended quotas.

#### 4. Struggling with the Proper Standard of Review

The standard of review by panels (and by the Appellate Body) in most WTO proceedings is considerably broader than the general standard in the United States for review of administrative decisions, articulated in the context of United States judicial review of administrative agency determinations in *Chevron USA, Inc. v. Natural Resources Defense Board*,<sup>344</sup> or that followed by the United States Court of International Trade in dumping and countervailing duty cases, where the Court will overturn an administrative decision only if it is “unsupported by substantial evidence on the administrative record or otherwise not in accordance with law.”<sup>345</sup> For the panels, the generally accepted standard is “objective assessment,” somewhere between a *de novo* review and “total deference.”<sup>346</sup> However, application of this

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344. 467 U.S. 837, 844 (1984).

345. *See* 19 U.S.C. § 1516a(b)(1), (2) (2002). In certain other instances, the Court of International Trade standard is even narrower, i.e., “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(A).

346. The exception is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade art. 17.6 (1994) [hereinafter GATT]. There, Article 17.6 provides a distinct standard of review for both facts and law that is somewhat closer to *Chevron*. Article 17.6(i) provides: “[I]n its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have

standard requires that the panels provide an “adequate and reasonable explanation” for its findings. According to the Appellate Body, panels are required to “determine the *facts* of the case and to arrive at *factual findings*,” and they are required to examine and consider all the evidence before” them. Whether there has been an objective assessment is an issue of law.

The Appellate Body, in contrast, under Article 17.6 of the DSU, is limited to reviewing “issues of law covered in the panel report and the legal interpretations developed by the panel.” However, the Appellate Body

cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel’s exercise of its discretion.<sup>347</sup>

In applying this standard here, the Appellate Body suggested, in reviewing the panel’s treatment of the USITC report, that the panel would have some leeway in deciding whether to accept the USITC’s analysis of productivity issues. However, when the panel, in reviewing other aspects of the USITC report, accepted the adequacy of that report while itself relying on “clarifications” outside the panel reports, the Appellate Body disagreed.

##### 5. Treatment of Business Confidential Information

The Appellate Body was clearly troubled by the refusal of the United States to provide certain business confidential information (“BCI”) to the Panel and to the EC, which it felt was inconsistent with the United States’ “duty and obligation to respond promptly and fully to request made by panels for information,” given the Panel’s obligation to make its objective assessment of the facts. It was not persuaded by the United States that the United States was entitled to withhold the information under Article 3.2 of the Safeguards Agreement, which states that “such information shall not be disclosed without permission of the party submitting it.” However, while “deploring the conduct of the United States” in this instance, the Appellate Body left

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reached a different conclusion, the evaluation shall not be overturned.” Article 17.6(ii) provides: “[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.”

<sup>347</sup> *Wheat Gluten* Appellate Body Report, *supra* note 329, ¶ 150.

it to the Panel's discretion to determine whether to draw adverse inferences based on the United States' refusal to provide the data. The Panel's decision not to do so in this instance was not disturbed by the Appellate Body.

#### 6. Avoiding Again a Definition of "Unforeseen Developments"

In *Argentina - Footwear Safeguard* and *Korea - Dairy Safeguard*, the European Communities were successful in convincing the Appellate Body (over United States objections, among others) that the Agreement on Safeguards did not trump Article XIX of the GATT and, in particular, that a Member must show "unforeseen developments" in order to justify the imposition of safeguard measures. Here, in a case against the United States, the EC saw an ideal opportunity to extend and define the "unforeseen developments" requirement.

Both the Panel and the Appellate Body disagreed. The United States' wheat gluten safeguards had been disposed of on multiple other grounds, as discussed above. Under these circumstances, in the interest of judicial economy, the panel saw no need to deal with the "unforeseen developments" thicket. The Appellate Body agreed, noting with approval its statement in *United States - Shirts and Blouses* that "[a] panel need only address those claims which must be addressed in order to resolve the matter at issue in the dispute."<sup>348</sup> Since the safeguard measures were found to be inconsistent with the Safeguards Agreement, there is no need to address their consistency with Article XIX of the GATT.

#### **Commentary:**

##### 1. The Devil is in the Details

Perhaps more than the Appellate Body's earlier decisions on safeguards measures, this case confirms the old saying, "the devil is in the details." Thus, the arcane procedural details of the Appellate Body's ruling are more significant and substantive than may appear at first glance. By taking a strict, textual based interpretation of the provisions of the Safeguards Agreement, insisting on a careful—some would say "extreme"—analysis of causation, etc., the Appellate Body has again raised the bar for competent authorities making serious injury determinations. Among other things, it is not sufficient for the competent authority to simply examine and rule upon the issues the parties raised in the proceeding; the authority must independently investigate other significant factors, whether or not they have been raised by the parties. Also, the competent authority must take care to assure that injury caused by other sources is not erroneously attributed to imports, a concept that

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348. Appellate Body Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, I, 323, at 340 (May 23, 1998).

appears deceptively simple in theory but will be complex in practice. This all may seem reasonable, and consistent with the narrow textual language of the Safeguards Agreement, but it may not be realistic in a real world context, where competent authority must operate in accordance with strict time limitations and in circumstances where not every scrap of data that might be relevant is available.

## 2. The Notification Process Acquires Meaning

Here, the Appellate Body has put teeth into the notification and consultation requirements of the Safeguards Agreement, in particular, demanding that a Member contemplating safeguard measures provide a meaningful opportunity for the other Members affected by those measures to exchange views. Moreover, the notification must include sufficient details of the contemplated measures—including the country-by-country quota amounts—so that the affected Members can react. Notification is no longer to be considered a pro-forma requirement of the law, honored more in its breach than its observance.

## 3. Another Blow to Special Treatment of Free Trade Area Partners

Differential and favorable treatment of members of free trade areas, in this case Canada and NAFTA, as in *Argentina - Footwear Safeguard*, with the other members of Mercosur, is clearly going to be difficult to sustain. If the imports of the affected product from the FTA member are included for purposes of the determination that increased imports are the cause of serious injury, it will be difficult or impossible to exclude that country's imports from the safeguards measures. It appears that the only way for a competent authority to do this is to make a sustainable serious injury finding that excludes the imports from the FTA member country in the serious injury analysis. Yet that may be very difficult to do if the FTA member (Canada) is a major supplier of the product (wheat gluten) to the Member contemplating the safeguards, given the United States' obligations under NAFTA. There, a NAFTA Party must exclude another Party or Parties from a global safeguards action unless their imports "account for a substantial share of global imports" and "contribute importantly to the serious injury, or threat thereof, caused by imports."<sup>349</sup> Under NAFTA, if the other Party or Parties are ultimately subject to safeguards, "trade liberalizing compensation" is immediately required, and failure to agree on such compensation permits sanctions by the NAFTA Party which is subject to global safeguards.<sup>350</sup>

This is in contrast to the Safeguards Agreement, under which in most cases there is no right of compensation for the Members subject to safeguards for the first three

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349. NAFTA art. 802(1).

350. NAFTA art. 802(6).

years of the restraints.<sup>351</sup>

#### 4. We Still Don't Know what "Objective Assessment" Means

The Appellate Body again suggests that the scope of panel review of competent authority decisions is limited, but the precise limits of the "objective assessment" of Article 11 of the DSU are not that clearly articulated. The panel will be given considerable leeway in reviewing the facts presented by the competent authority, clearly far more than under the United States' *Chevron* standard. The Appellate Body's standard of review for panels is narrower, much more akin to *Chevron*: it is limited to issues of law and abuses of panel discretion with regard to interpretation of facts, not second-guessing panel determinations simply because the Appellate Body might have reached a different result. The focus is on issues of law. Whether the Appellate Body is following or will consistently follow this relatively limited standard of review it has articulated remains to be seen.

#### 5. Dissatisfaction over Proper Treatment of Business Confidential Information

Finally, in what ultimately could be a significant problem for the United States and the USITC, the Appellate Body indicated its extreme unhappiness with the United States' refusal to provide certain BCI to the Panel and the European Communities. The reason for this refusal was presumably less the unwillingness of the United States to cooperate than the strict statutory and regulatory controls on the disclosure of business confidential information collected by the USITC to parties not subject to administrative protective order.<sup>352</sup> This is not the first dispute over BCI to reach the Appellate Body. In *Canada - Aircraft Exports*,<sup>353</sup> for example, Canada argued that Article 18.2 of the DSU did not "provide adequate procedural protection for confidential business proprietary information of the type that is before the Appellate Body."<sup>354</sup> Canada was concerned that the information requested would have been of interest to competitors in the commercial aircraft industry, and it noted that the Appellate Body had earlier declined to adopt additional procedures (beyond those earlier adopted by the Panel) to protect BCI. The Appellate Body again declined to do so, on the ground that the requirements in Article 17.10 that "[t]he proceedings of the Appellate Body shall be confidential" and in Article 18.2 for

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351. Safeguards Agreement art. 8(3). This grace period does not apply if there has been no absolute increase in imports of the goods subjected to restraints.

352. See 19 C.F.R. § 206.7(a), relating to the non-release of confidential business information collected by the USITC in the course of its investigation.

353. *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted Aug. 20, 1999.

354. *Id.* ¶ 127.

treatment of material submitted to the Appellate Body as confidential were adequate to protect BCI.<sup>355</sup>

To the extent the Appellate Body encourages panels to undertake their own independent analysis of competent authority data and desires to examine that data itself, the potential for future conflicts between the panels' need to have access to the information and the USITC's statutory constraints can only increase. The Appellate Body would do well to adopt more detailed procedures to protect BCI submitted by the Parties.

## 6. Retaliation and Implementation

Exercising its right of retaliation, the European Union acted after the Appellate Body ruling and imposed a retaliatory tariff on corn gluten imported from the United States.<sup>356</sup> The United States and the European Communities promptly reached agreement that the United States would implement the ruling by June 2, 2001.<sup>357</sup> On June 1, 2001, the United States Trade Representative, putting the best possible spin on the situation, announced that the safeguards would be terminated, and the United States wheat gluten industry would be provided with \$40 million over two years to "complete its transition to competitiveness."<sup>358</sup>

## B. The Lamb Meat Case

### *Citation:*

***United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*** (complaint by Australia and New Zealand, with the European Community, Canada and Japan as Third Party Participants<sup>359</sup>) WT/DS177/AB/R, WT/DS178AB/R<sup>360</sup>

355. *Id.* ¶¶ 143-147.

356. See Daniel Pruzin et al., *EU Initiates WTO Dispute Proceedings Against New U.S. Steel Safeguard Tariffs*, INT'L TRADE DAILY (BNA), Mar. 7, 2002, at D2.

357. See Update of the State of Play of WTO Disputes, Jan. 17, 2002, at 116.

358. Office of the U.S. Trade Representative, *Bush Administration Helps Wheat Gluten Industry Restore its Competitiveness* (Jun. 1, 2001); see Gary G. Yerkey, *Safeguards: U.S. Moves to Drop Restrictions on Imports of Wheat Gluten, Offers Support for Industry*, INT'L TRADE DAILY (BNA), Jun. 5, 2001, at d2.

359. The European Communities participated fully in the proceedings. Canada attended as a "passive observer," while Japan, which like Canada filed no written submissions, was upon its request afforded an opportunity to intervene in discussions as necessary and where permitted by the Appellate Body. Appellate Body Report, *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178AB/R, ¶ 8 (May 16, 2001) [hereinafter *Lamb Meat Appellate*

The DSB adopted the Appellate Body Report and Panel Report, as modified by the Appellate Body Report, on May 16, 2001.

***Explanation:***

**I. Facts**

*United States - Lamb Meat Safeguard* is the fourth in a series of Appellate Body decisions (after *Argentina - Footwear Safeguard*,<sup>361</sup> *Korea - Dairy Product Safeguard*,<sup>362</sup> and *United States - Wheat Gluten Safeguard*<sup>363</sup>) that have made it significantly more difficult for national competent authorities to impose product safeguards in a manner that will withstand WTO scrutiny. Significantly, this is the first decision to discuss the relationship between the Safeguards Agreement and Article XIX of the GATT in a case involving the application of safeguards by the United States, although once again the Appellate Body sidesteps the substantive issue of what factual basis is required for an “unforeseen developments” determination. This decision, yet again, demonstrates the Appellate Body’s aversion to the imposition of safeguards, a trade remedy which, while permitted under the GATT and the Safeguards Agreement, is inherently protectionist, as it authorizes restraints on imports even in the absence of any “unfair” trade practice such as dumping or government subsidization.

The USITC initiated a safeguards investigation of lamb meat imports in October 1998. In July 1999, by Presidential Proclamation, the United States imposed a tariff-rate quota on imports of lamb meat, effective as of July 22, 1999.<sup>364</sup> The two major exporters of lamb meat to the United States—Australia and New Zealand—predictably challenged these restrictions

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Report] (complaint by Australia and New Zealand, with the European Community, Canada and Japan as Third Party Participants).

360. This explanation is based on the *Lamb Meat* Appellate Body Report, *supra* note 359, except as otherwise noted.

361. *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (complaint by the European Community, with Indonesia and the United States as Third Party Participants), *discussed in WTO Case Review 2000, supra* note 113, at 73.

362. *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (complaint by the European Community, with the United States as Third Party Participants), *discussed in Bhala & Gantz, WTO Case Review 2000, supra* note 113, at 87.

363. *See* discussion *supra* pp. 607-19.

364. Under a tariff rate quota, imports up to a specified volume are dutiable at one tariff rate (9%, 6% and 3% for each of the three initial years of the safeguard, respectively) and at a much higher rate for imports above the specified volume (40%, 32% and 24% for the three initial years, respectively.) *See* *Lamb Meat*, USITC Inv. No. TA-204-3 (Jan. 2001), Executive Summary, at 6.



## 2. Principal Issues on Appeal

The various parties and third party participants raised a total of six issues on appeal from the Panel report.<sup>365</sup>

- (1) Whether the United States, like Argentina in *Argentina - Footwear Safeguard* and Korea in *Korea - Dairy Product Safeguard*, had violated Article XIX of the GATT by failing to demonstrate the existence of “unforeseen developments” relating to the injurious effect of increasing imports on the domestic industry, and whether changes in the product mix of imported lamb meat met that requirement;
- (2) Whether the “domestic industry” was properly defined by the USITC to include not only lamb meat packers and “breakers” but also growers and feeders of live lambs;
- (3) Whether the Panel’s review of the USITC’s threat of serious injury evaluation was correct;
- (4) Whether the Panel’s evaluation of the USITC’s causation analysis (serious injury caused by increasing imports) was erroneous;
- (5) Whether the Panel erred, on grounds of “judicial economy,” to consider certain of New Zealand’s claims of error by the USITC; and
- (6) Whether the United States had violated Articles I and II of GATT (most favored nation (MFN) treatment, tariff bindings) as a result of its violation of certain provisions of the Safeguards Agreement.

With the exception of (1) and (3), above, most of these challenges related to the “nuts and bolts” of competent authority investigations in safeguards matters, largely technical issues that nevertheless significantly affect the ability of competent authorities and Member governments to sustain WTO challenges to the imposition of safeguards. Again, the “devil is in the details,” and the Appellate Body’s strict approach to the Safeguards Agreement makes those details in the manner in which national competent authorities act significant.

## 3. Arguments of the Parties<sup>366</sup>

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365. See *Lamb Meat* Appellate Body Report, *supra* note 359, ¶ 64.

366. See *Lamb Meat* Appellate Body Report, *supra* note 359, ¶¶ 11-63.

### a. Unforeseen Developments

In the course of this proceeding, the United States devised a new argument against the requirement that there be a showing of “unforeseen developments” under Article XIX in order to apply safeguards measures. The United States argued that it was unnecessary for the USITC to reach a specific “conclusion” finding unforeseen developments. As long as the competent authority has developed a factual basis that demonstrates unforeseen developments, as was the case here, the conclusion does not have to be presented in the report. (The reasons for this approach are obvious: at the time of the USITC determination, the panels and Appellate Body in *Argentina - Footwear Safeguard* and *Korea - Dairy Product Safeguard* had not reintroduced the “unforeseen developments” pre-condition for safeguards measures, which had been dormant for at least three decades.) The United States, relying on the 1951 *Hatters’ Fur* GATT panel decision,<sup>367</sup> suggested that “specific developments in the marketplace leading to an injurious import surge will not normally be ‘foreseen’ by negotiators at the time of making tariff concessions.” Once the USITC has provided a factual basis for a finding of “unforeseen developments,” the Complaining Parties have the burden of proving that the factual basis (here, a change in the product mix) is insufficient, and here they had failed to do so.

Australia, New Zealand and the European Communities disagreed. Australia contended that the competent authority, under Article 3.1 of the Safeguards Agreement, had to provide “reasoned conclusions” on “all pertinent issues of fact and law;” the Appellate Body had already held that “unforeseen developments” must be demonstrated as a matter of fact. Thus, the *ex post facto* efforts of the United States to discern the necessary facts from the USITC’s report were not sufficient. Moreover, if the Appellate Body accepted the USITC’s analysis as sufficient, Australia challenged the Panel’s finding that a change in product mix could qualify as “unforeseen developments” under Article XIX of the GATT. New Zealand pointed out that the USITC never even considered, let alone demonstrated, the existence of unforeseen developments.

### b. Definition of the Domestic Industry

The United States argued that it made sense to define the domestic industry of producers to include growers and feeders of live lambs, rather than to limit it to packers and “breakers,”<sup>368</sup> given the continuous line of production and the fact that

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367. See *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX, (“Hatters’ Fur”)*, GATT/CP/106, Oct. 22, 1951.

368. According to the USITC, “packers” are those who slaughter lambs and may also process the lamb meat into primal, sub-primal or retail cuts. Alternatively, the packers may

the value added by growers and feeders constitutes about 88 percent of the wholesale cost of lamb meat. Excluding growers and feeders and concentrating only on packers and breakers thus would result in the inclusion of only 12 percent of the industry by value in the analysis. Also, if the competent authorities were required to assess “all relevant factors” they had to necessarily consider all aspects of the industry, including the growers and feeders. It was, therefore, reasonable to interpret “producers” in Article 4.1(c) of the Safeguards Agreement as including all of these categories.

The words “producer of a like product” in Article 4.1(c) of the Safeguards Agreement were clear, according to Australia; the “producers” were the packers and breakers not the growers and feeders. Otherwise, Members would have excessively broad discretion to determine how far “upstream” or “downstream” they could go to define the domestic industry. For New Zealand, once it was demonstrated that the “like product” was lamb meat, the domestic industry constituted the producers of lamb meat.

### c. Threat of Serious Injury Analysis

The United States defended the data collection of the USITC and contended that it was sufficient for the USITC to evaluate all factors of “an objective and quantifiable nature” that affect the state of the domestic industry, determining the causal link (between imports and threat of serious injury) based on “objective evidence.” The United States contended that the Panel also correctly determined that it was not to conduct a *de novo* review of the USITC’s determination, but was limited to evaluating the USITC investigation and report and determining whether it had examined all relevant facts and provided a reasoned explanation as to how the facts supported the determination. The USITC also met its burden of demonstrating that the overall economic condition of the industry was likely to be seriously injured as a result of increased imports.

Australia and New Zealand contended that the USITC data was faulty because it was not sufficiently representative of “those producers whose collective output . . . constitutes a major proportion of the total domestic production of those products.” In other words, the USITC’s database was insufficiently broad to properly evaluate the state of the domestic industry. Moreover, whether the USITC met the requirements of the Safeguards Agreement must be determined solely from the USITC report, not from after-the-fact representations by the United States before the Panel, and it was incumbent on the USITC to make a determination that serious injury would occur unless safeguard measures were imposed.

New Zealand also argued, in a manner reminiscent of its position in *United States - Wheat Gluten Safeguard*, that the Panel had to go beyond the report and the

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simply perform the slaughtering function, and ship the lamb carcasses to “breakers” to perform the processing function. See USITC, Lamb Meat, Determination and Views of the Commission, Inv. No. TA-201-68, USITC Publ. 3176, April 1999, at I-5.

evidence collected by the competent authority to determine if the safeguard actions were consistent with the covered agreements. In effect, New Zealand contended that the Parties (New Zealand and Australia) could introduce before the Panel evidence that was not in the record before the competent authority, and the Panel was bound to consider that evidence. In addition, New Zealand criticized the Panel for relying on USITC data for the most recent period in undertaking the Panel's own threat analysis; the Panel should not have ignored earlier data.

#### d. Causation

According to the United States, the situation here was the same as in *United States - Wheat Gluten Safeguard*, where the Appellate Body reversed a similar panel conclusion that imports had to be isolated from all other factors and be a *per se* cause of serious injury. Here, the USITC had determined that increased lamb meat imports were themselves a "necessary and sufficient" cause of serious injury and alone met the threshold requirements. The USITC also took steps to assure that injury arising from other causes was not attributed to imports. However, Australia argued that the Appellate Body's standard was not met in this case because of the USITC's failure to show that any threat of serious injury caused by other factors had not been erroneously attributed to imports. Likewise, according to New Zealand, the United States did not comply with the causation analysis requirements set out by the Appellate Body in *United States - Wheat Gluten Safeguard*.<sup>369</sup> There, it was necessary first, to distinguish injurious effects of imports from injurious effects of other factors, secondly, to demonstrate that the injury caused by those other factors was not caused by imports, and finally, to determine a "genuine and substantial relationship of cause and effect" between the increased imports and serious injury. The European Communities agreed that the competent authority had to demonstrate an "exclusive link" between the import surge and serious injury.

#### e. Judicial Economy

New Zealand complained that the Panel discussed only the safeguard investigation, not the measures themselves. The measure the United States imposed was more restrictive than what the USITC proposed and thus was inconsistent with Article 5.1 of the Safeguards Agreement. The United States disagreed, arguing that not only was this consistent with other Appellate Body decisions on the issue, but that, in any event, New Zealand had not met its burden of proof.

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369. See discussion *supra* pp. 607-19.

***Rationale and Holdings:***<sup>370</sup>**1. The Unforeseen Developments Determination Must be Made by the Competent Authority**

Article XIX:1 of GATT provides in pertinent part:

If, as a result of *unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory or like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as many be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (Emphasis added.)

While the decisions in *Argentina - Footwear Safeguard* and *Korea - Dairy Product Safeguard* demonstrated that the Safeguards Agreement “clarified and reinforced” Article XIX of GATT (rather than effectively eliminated, as some Members apparently thought<sup>371</sup>), these decisions did not “examine when, where, or how the demonstration of unforeseen developments should occur.” Here, the Appellate Body addressed the “when” and “where,” but again avoided deciding the “how.”

As to the “when” and “where,” since an unforeseen developments determination is a prerequisite for the imposition of safeguard measures, it follows that the demonstration has to be made *before* such measures are applied, that is, in the competent authority’s report. Here, this did not occur since the USITC did not consider unforeseen developments at all. While the report did discuss the change in the lamb meat imports product mix, it does not explain why that change could be regarded as “unforeseen developments.” This failure to consider may have occurred, the Appellate Body speculated, because there was no requirement for an “unforeseen developments” determination in United States safeguards legislation. The Appellate Body also noted that the USITC report in *Lamb Meat* was completed seven months *before* the Appellate Body Reports in these two cases were circulated, which could also explain why the USITC’s report did not address unforeseen developments. However, it acknowledged that the United States was no longer arguing, as it did in *Argentina - Footwear Safeguard* and *Korea - Dairy Product Safeguard*, that the omission of the unforeseen developments language from the Safeguards Agreement

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370. *Lamb Meat* Appellate Body Report, *supra* note 359, ¶¶ 65-198.

371. *See WTO Case Review 2000*, *supra* note 113, at 73-74, 86-87.

meant that no demonstration of the existence of unforeseen circumstances was required. Regardless, these considerations were not an excuse. The published report of the competent authority, in this case the USITC, “must contain a ‘finding’ or ‘reasoned conclusion’ on ‘unforeseen developments.’”

This finding having been made, the Appellate Body again sidestepped the substantive issue (“we do not find it necessary to examine”) as to what was required for a showing of “unforeseen developments,” avoiding a decision as to whether a change in product mix could satisfy the requirement!

## 2. Lambs are not “Directly Competitive” With Lamb Meat

The USITC’s rationale for including lamb growers and feeders as part of the domestic industry for purposes of the safeguards investigation was a “continuous line of production” and a “coincidence of economic interests,” although neither test, according to the Appellate Body, was mandated by United States law. The controlling law is Article 4.1(c) of the Safeguards Agreement, which provides in pertinent part that “in determining injury or threat thereof, a ‘domestic industry’ shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a member. . . .” There are two elements here—“producers” and “like or directly competitive products.” According to the Appellate Body, “the legal basis for imposing a safeguard measure exists *only* when imports of a specific product have prejudicial effects on domestic producers of products that are ‘like or directly competitive’ with that imported product.”

Here, there was no dispute that the like product was “lamb meat.” Regardless of the United States’ rationale, if the input product (lambs) and the end product (lamb meat) were not like products or directly competitive, it was irrelevant under the Safeguards Agreement whether there was a continuous line of production, whether the input product was a high percentage of the value of the end product, whether the input product had no use except as the end product, or whether there was a coincidence of economic interests. The fact that Article 4.1(c) referred to “producers as a whole” did not help; this language did not imply that producers of other, not like or directly competitive products, could be included within the scope of like product. The domestic industry in this case, therefore, could only include the producers of lamb meat within the scope of the like product, not the growers and feeders.

## 3. An “Objective Assessment” under DSU Article 11 is Somewhere Between *de novo* Review and Total Deference

The Appellate Body, still struggling with the scope of review, reiterated its formulation from *Argentina - Footwear Safeguard*:

Article 11 of the DSU, and, in particular, its requirement that “. . .

a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”, sets forth the appropriate standard of review for examining the consistency of a safeguard measure with the provisions of the *Agreement on Safeguards*.

The Appellate Body confirmed that this was neither a *de novo* standard nor “total deference” to the competent authority. The requirement of an “objective assessment” under Article 4.2(a) of the Safeguards Agreement requires an evaluation of all relevant factors and a “reasoned and adequate explanation” of how the facts support the determination.

Moreover, while panels must not conduct a *de novo* review, they are not permitted simply to accept the conclusions of the competent authorities. Rather, the Panel must critically examine the competent authority’s “explanation in depth and in light of the facts before the panel.” Here, the Appellate Body concluded that the Panel did exactly that.

However, the Panel here limited its examination to the arguments the parties put forth and presented to the USITC. Wrong! One should not assume that the issues the parties put forth in the domestic investigation are necessarily the same as those the governments would be presented with in a WTO dispute, even if they were represented in the USITC proceedings.<sup>372</sup> A WTO party is not confined to the arguments made to the competent authorities, as stated in *United States - Wheat Gluten Safeguard*:

[A]s *competent authorities* themselves are obliged, in some circumstances, to go beyond the arguments of the interested parties in reaching their own determinations, so too, we believe *panels* are not limited to the arguments submitted by the interested parties to the competent authorities in reviewing those determinations in WTO dispute settlement.

The WTO members, of course, have discretion, but such discretion is not unlimited; they must participate in the procedures “in good faith in an effort to resolve the dispute.” Thus, they cannot “improperly withhold evidence from competent authorities with a view to raising those arguments later before a panel.”

Here, the attack on the USITC’s threat analysis was based on the database used, which did not represent producers comprising a major portion of all domestic

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372. The Appellate Body cited *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel H-Beams from Poland*, WT/DS122/AB/R (Apr. 5, 2001), ¶ 94, in support of its conclusion. Interestingly, that was an antidumping case, in which foreign governments are seldom significantly involved in the proceedings before the competent authority.

producers. The USITC apparently failed to obtain data from producers that in the aggregate represented “a major portion of the total domestic production of the domestic industry,” but only data from a smaller portion. This, according to the Panel, was a violation of the Safeguards Agreement, even though the Agreement does not specify that the data must be representative of a particular portion of the domestic industry.

The Appellate Body agreed. Noting that “threat of serious injury” means “serious injury that is clearly imminent under Article 4.1(b) of the Safeguards Agreement, the Appellate Body initially focused on the “very high standard” that a threat analysis requires a standard that is much higher than “material injury” under the Antidumping Agreement and Subsidies (SCM) Agreement.<sup>373</sup> Moreover, “any determination of a threat of serious injury ‘shall be based on facts and not merely on allegation, conjecture or *remote possibility*.’” Given these considerations, a threat determination cannot be based on data that is not representative of the domestic industry. This does not mean, necessarily, data from all members of the domestic industry, but the data must be “sufficiently representative to give a true picture of the ‘domestic industry.’” This will be determined on a case-by-case basis, considering the “peculiarities” of the domestic industry. In this case, the United States failed the test. However, the USITC was justified in relying most heavily on the more recent data, as that is likely to “provide the strongest indication of the likely future state of the domestic industry,” but it should not have ignored entirely earlier data and should have assessed that earlier data in the context of the entire period of investigation.

Significantly, the Appellate Body believed that the Panel focused its analysis on the insufficiency of the data, to the exclusion of consideration of the parties’ criticism of the substantive aspects of the USITC’s report, primarily relating to increases in the prices of lamb meat in the United States. Nonetheless, the Appellate Body reviewed these contentions based on the facts presented in the USITC report. Here again, the USITC fell short, this time for failing to reconcile an “apparent contradiction,” that is, between factual evidence of higher prices and the USITC’s view that the industry is still threatened with serious injury.

#### 4. Injury Caused by Other Factors Cannot be Attributed to Imports

What does the standard for causation require? According to the Panel, it means that “increased imports must not only be *necessary*, but also *sufficient* to cause or threaten a degree of injury that is ‘*serious*’ enough to constitute a significant overall impairment in the situation of the domestic industry”—essentially the same standard the Panel used and the Appellate Body rejected in *United States - Wheat Gluten*. The same result occurred here. The Appellate Body confirmed that the causal link between increasing imports and serious injury could exist, even where other factors

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373. See Subsidies and Countervailing Measures Agreement arts. 5, 15; see also Antidumping Agreement art. 3, HANDBOOK, *supra* note 10, at 473, 392; see also GATT art. VI.



are contributing at the same time to the situation of the domestic industry. This did not mean, however, that the United States acted consistently with the causation requirements of Article 4.2 of the Safeguards Agreement. There was still the question of whether the USITC erroneously permitted injury caused by other factors to be attributed to increased imports.

Again referring to *United States - Wheat Gluten Safeguard*, to avoid this problem, the competent authority must assure that the “injurious effects caused by all the different causal factors are distinguished and separated.” Here, the USITC, following United States law, considered whether six other factors alleged to be contributing to the situation of the domestic industry were a “more important cause” of threat than serious injury.<sup>374</sup> However, this analysis of relative causal importance does not assure that injury is not attributed to other factors besides increasing imports.

While the other factors were assessed as having some injurious effect, there was no indication that “the USITC properly separated the injurious effects of these other factors from the injurious effects of the increased imports.”

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374. See 19 U.S.C. § 2252(b)(1)(B), which provides that “[f]or purposes of this section, the term ‘substantial cause’ means a cause which is important and not less than any other cause.”

### 5. Judicial Economy Means We Don't Have to Decide All the Issues. . .

Since the Appellate Body already had encouraged panels generally to exercise judicial economy (declining to decide certain issues in circumstances where there had already been a determination on other grounds that a safeguard measure was inconsistent with the Safeguards Agreement), in *Argentina - Footwear Safeguard* and *United States - Wheat Gluten Safeguard*, it argued that all issues had to be decided short shrift here. When the measure that is the subject of the dispute has been found to be inconsistent with certain provisions of the Safeguards Agreement, the Panel is not required to address further claims that a measure is inconsistent with other provisions. This is unnecessary because there are already grounds for terminating the measure. Similarly, where the Appellate Body confirms panel action holding a safeguards measure to be illegal, it will not consider other issues that would be ripe only if the Panel's action had been reversed. Therefore, in the present case, it was unnecessary for the Panel to decide whether the safeguard measures the United States actually imposed were consistent with the Safeguards Agreement.

#### ***Commentary:***

##### 1. Will the Competent Authority Ever be Able to Meet the Appellate Body's Standards for Causation?

The Appellate Body's decision in *United States - Lamb Meat Safeguard* leaves the reader who has previously studied *Argentina - Footwear Safeguard*, *Korea - Dairy Products Safeguard*, and *United States - Wheat Gluten Safeguard* a little uneasy. On the bright side, there is a high level of consistency in the four Appellate Body decisions, and a free trader is likely to welcome the Appellate Body's healthy skepticism regarding the use of protectionist tools such as safeguards. On the other hand, from a policy and process point of view, one may wonder whether the Appellate Body has gone beyond its mandate in effectively reading safeguards out of the GATT. The procedural and substantive hurdles that a Member and its competent authority must overcome in order to sustain the application of safeguards are monumental. Moreover, there seems to be some question as to whether in the real world it will be possible to satisfy the Appellate Body that *any* safeguard is consistent with the Safeguards Agreement. Also, even after four decisions, the Appellate Body has not addressed a crucial issue—what constitutes “unforeseen developments.”

While there is undoubtedly some justification for the Appellate Body's conclusions in the “all relevant factors” language of Article 4:2(a) of the Safeguards Agreement, this decision and *United States - Wheat Gluten Safeguard* appear to leave the competent authorities in a very difficult position with regard to the extent of their independent investigation. The fact that issues that could have been raised before the USITC, even by the same governments that have now brought the action in the DSB, may be raised for the first time at the DSB panel level is not an efficient way to

manage an administrative process, particularly in the absence of a more direct means of remanding a case to the competent authority.

In this particular instance, one could argue that the Appellate Body was simply second-guessing the USITC regarding the USITC's definition of "domestic industry." The USITC's logic in including growers as part of the domestic industry is persuasive, and the Appellate Body's rejection of that approach, based on the "producers as a whole of the like or directly competitive product" language in Article 4:1(c) of the Safeguards Agreement, seems less than compelling given that 85 percent of the lamb meat "product" was the lamb.

In addition, the decision casts considerable doubt on a long-standing provision of United States safeguards law, whereby the causation requirements (that increasing imports are the cause of serious injury) can be satisfied if other possible causes are analyzed and the USITC concludes that none of these were "a more important cause" than increasing imports. In the future, the USITC most likely will be required in its investigations to isolate the various causes of injury, assess each cause and attribute a degree of causality to each of them, even though the Appellate Body does not specify precisely how this should be done. This is necessary to avoid attributing any of the other causes to increasing imports under Article 4:2(b) of the Safeguards Agreement.

Here, as in *United States - Wheat Gluten Safeguard*, the United States moved promptly to implement the DSB ruling. On August 31, 2001, the Bush Administration announced that it had reached agreement with New Zealand and Australia to terminate the safeguards on November 15, 2001, and that it would provide financial assistance to domestic lamb producers in order to help them adjust to foreign competition.<sup>375</sup>

## 2. Can a Member Apply Safeguards in Good Conscience in the Future?

What does this mean in the real world? In the future, particularly for a cynical government, even the application of a safeguard measure that is virtually certain to be overturned by the Appellate Body may nevertheless have significant benefit for the protected domestic industry. For example, in *United States - Lamb Meat Safeguard*, the United States government imposed the definitive safeguards on July 7, 1999 (well before the United States could have possibly anticipated the Appellate Body decisions in either *Argentina - Footwear Safeguard* or *Korea - Dairy Product Safeguard*), while the DSB did not adopt the Appellate Body report until May 16, 2001. By agreement of the Parties, the decision was implemented by removal of the safeguards in November 2001, almost two and a half years after the initial imposition of the

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375. See Press Release, U.S.T.R., Administration to Terminate Lamb TRQ Early as Part of WTO Deal (Aug. 31, 2001). Funds in the amount of up to \$47.7 million were to be provided through Fiscal Year 2003. The existing safeguard measures would have expired in June 2002 if not earlier terminated.

safeguard measure by the United States.<sup>376</sup> Thus, notwithstanding the Appellate Body decision, the United States lamb meat industry enjoyed more than two years of safeguards protection. (Under the Safeguards Agreement, safeguard measures are limited to only four years unless extended.<sup>377</sup>)

Moreover, a Member that is intent on using safeguards for as long as possible may still be better off with a Safeguards Agreement that is virtually impossible to comply with legally, particularly when linked to the “unforeseen developments” obligation in Article XIX of the GATT, than the Member would be without the Safeguards Agreement. Safeguards measures were governed solely by Article XIX of GATT prior to January 1, 1995. Under GATT, Article XIX:3(a), the Member to whose exports the safeguard measure is being applied had the right, after ninety days, to “suspend substantially equivalent concessions,” i.e., to retaliate. Under the Safeguards Agreement, a Member whose exports are subject to another Member’s safeguard measures may not exercise its right to suspend concessions (retaliate) for three years, provided that the measure “has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.”<sup>378</sup> Thus, in most circumstances, a WTO Member that in the future decides to impose safeguards (for three years, for example) can reasonably be sure of obtaining more than a two-year free ride—until the Dispute Settlement Body has found the safeguards to be in violation of GATT Article XIX and/or the Safeguards Agreement and a period of at least several months for compliance has been agreed upon—before any retaliation is likely to be imposed!

Of course, the EU and several other Members are threatening to retaliate now against the recent United States action to impose safeguards on imported steel. Thus, the free ride experienced up to now by safeguards users may be over, not only in the case of steel, but perhaps in other, future cases as well.<sup>379</sup>

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376. Implementation of the results of a determination by the Dispute Settlement Body within six months, as here, is more prompt than normal. Article 21:1 and 21:3 of the DSU indicates that “*Prompt compliance with recommendations or rulings of the DSB is essential* in order to ensure effective resolution of disputes to the benefit of all Members. . . . If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a *reasonable period of time* in which to do so.” Rules and Procedure Governing the Settlement of Disputes, Dec. 1996, WTO Agreement art. 21:1, 21:3 (emphasis added). A reasonable period of time is defined in the same article as no more than 15 months. *Id.* art. 21:3(c)

377. Agreement on Safeguards art. 7:1.

378. *Id.* art. 8:3. The Appellate Body has not to date addressed the possible conflict between GATT art. XIX:3(a) and art. 8:3.

379. As of this writing, the EC has threatened to impose \$2.5 billion worth of import sanctions on goods from the United States, on the ground that the steel safeguards imposed on March 11, 2002, did not meet the requirements of Article 8.3. While the U.S. International Trade Commission used five years of data, 2000-2001 data showed a decrease rather than an increase in imports. Other violations of the Safeguards Agreement have also been alleged. See Daniel Pruzin, *Steel: Trade Law Experts Pan U.S. Steel Tariffs, Say WTO Members Permitted*

### **C. The Pakistan Yarn Case**

#### ***Citation:***

***United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*** (complaint by Pakistan, with the European Communities and India as Third Party Participants) WT/DS192/AB/R<sup>380</sup>

The DSB adopted the Appellate Body Report and Panel Report, as modified by the Appellate Body Report, on 5 November 2001.

#### ***Explanation:***

##### **1. Facts and Overview**

*United States - Yarn Safeguard* arose not under GATT Article XIX and the WTO Safeguards Agreement, but in somewhat similar provisions found in the WTO Agreement on Textiles and Clothing (“ATC”), an agreement that is effectively a transitory mechanism during a ten-year period during which the current network of quota systems for textiles and clothing will be replaced by tariffs, and textiles and clothing will be subject to the other normal GATT disciplines.<sup>381</sup> Article 6.2 of the ATC states in pertinent part:

Safeguard action may be taken . . . when, on the basis of a determination by a Member, it is demonstrated that *a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or competitive products*

. . .

Article 6.4 states: “The Member or Members to whom *serious damage*, or actual threat thereof . . . is attributed, *shall be determined on the basis of a sharp and*

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*to Retaliate*, INT’L TRADE DAILY (BNA), Mar. 19, 2002, at D5; Daniel Pruzin, *Steel: EU Plans to Aim \$2.5 Million in Sanctions at U.S. Areas in Favor of Steel Safeguards*, INT’L TRADE DAILY (BNA), Mar. 26, 2002, at D5.

380. This analysis is based on the Appellate Body Report, *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (Oct. 8, 2001) [hereinafter *Cotton Yarn Appellate Body Report*] (complaint by Pakistan, with the European Communities and India as Third Party Participants); *see also* Daniel Pruzin, *WTO: WTO Appellate Body Upholds Decision Against U.S. Safeguard on Pakistani Yarn*, INT’L TRADE DAILY (BNA), Oct. 10, 2001, at D8.

381. Agreement on Textiles and Clothing, The Uruguay Round Final Act, arts. 1.1, 9, available at [http://www.wto.org/english/docs\\_e/legal\\_e/16-Text.wpf](http://www.wto.org/english/docs_e/legal_e/16-Text.wpf) [hereinafter ATC].

*substantial increase in imports, actual or imminent, from such a Member or Members individually . . .*" (Emphasis added).

The United States, as it has on several occasions in the past,<sup>382</sup> sought to protect its domestic textile and apparel producers by availing itself of the safeguards provisions of the ATC, which in Article 6 provides for safeguards under certain circumstances. However, it imposed restraints only against yarn imports from Pakistan, even though imports from the other major producer, Mexico, were also increasing. The Appellate Body rendered its decision effectively disapproving the United States' safeguards on September 27, and the Appellate Body adopted the decision on October 8. Perhaps in part because the United States clearly recognized and appreciated Pakistani cooperation in the war against terrorism, implementation by the United States was uncharacteristically swift; it lifted the restraints on Pakistani yarn imports on November 9, 2001.<sup>383</sup>

## 2. Principal Issues on Appeal<sup>384</sup>

The issues raised on appeal were in part procedural and technical, again reflecting the Appellate Body's efforts to articulate a standard of review to guide future panels, as well as its first effort to set out a somewhat different injury standard and safeguards scheme from the one that appears in the Safeguards Agreement. However, United States efforts to provide favorable treatment for its NAFTA partners, in this case Mexico, was again challenged. The issues were summarized as follows:

- a. Whether the Panel exceeded its mandate (and applied an erroneous standard of review) under Article 11 of the DSU in considering evidence (import data) that was not in existence at the time of the United States' safeguards determination;
- b. Whether the United States, under Article 6.2 of the ATC, erred by excluding captive yarn production by integrated yarn/textile producers from the determined scope of its domestic industry; and
- c. Whether the United States, under Article 6.2 of the ATC, erred in excluding

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382. See, e.g., *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS84/R (Feb. 25, 1999); *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, ¶ 7.21 (May 23, 1997).

383. See Update of WTO Disputes Settlement Cases, Jan. 17, 2002, at 114. Despite considerable domestic opposition from textile interests, the Bush Administration also provided Pakistan with expanded access to the United States to the U.S. textile market, worth an estimated \$476 million over three years. *White House Grants Pakistan Quota Concessions Worth Half a Billion*, INSIDE U.S. TRADE (Inside Wash. Publ'n), Feb. 15, 2002, at 1, 26.

384. *Cotton Yarn Appellate Body Report*, *supra* note 380, ¶ 61.

consideration of rapidly increasing yarn exports from Mexico and simultaneously determining that increases from Pakistan were causing serious damage or threat of damage to United States yarn producers.

### 3. Arguments of the Parties<sup>385</sup>

#### a. Standard of Review

The United States objected to the Panel's consideration of evidence that was not in existence at the time the United States determined that conditions warranted the imposition of safeguards. According to the United States, there was no way that the competent authority could have anticipated that government data—not available at the time—would contradict industry data showing a significant increase in Pakistani source cotton yarn during 1998. The Panel must be limited to “consideration of evidence . . . in existence at the time the competent authority made its determination.”

Other cases, including *United States - Shirts and Blouses*, *Korea - Dairy Products*,<sup>386</sup> and *United States - Wheat Gluten*,<sup>387</sup> have reached similar conclusions. If panels are permitted to review the competent authority's determination using evidence that was not available to the authority, no safeguard imposed under the Article 6 mechanism could withstand review. The European Union, siding with the United States, argued that, as a general rule, panels should not try to review actions of the competent authority based on evidence that was not “objectively” available at the time of the determination. However, there may be instances when the panel is justified in considering such evidence, such as when determining whether the investigation was sufficiently thorough. Among the relevant issues was whether the competent authority made an effort to verify data from unofficial (i.e., industry) sources.

Pakistan countered that the Panel was within its authority under Article 11 of the DSU to examine evidence not available to the competent authority, for the purpose of determining whether the conditions for applying safeguards were satisfied at the time of the Panel review. If the United States' view were accepted, even a safeguard imposed based on erroneous data did not need to conform with the ATC. The role of the Panel went beyond assessing the competent authority's investigation, to determine if the Member relying on Article 6 has the right to impose safeguards. India, supporting Pakistan, contended that Article 6 of the ATC was not satisfied by a determination based on incorrect data. What the Panel had done, properly, was to examine evidence not available to the competent authority to determine if the safeguard was justified at the time the competent authority imposed it.

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385. *Cotton Yarn* Appellate Body Report, *supra* note 380, ¶¶ 11-60.

386. *Korea - Definitive Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R, ¶ 7.30 (Jan. 12, 2000); *United States - Wheat Gluten*, *supra* pp. 606-19, ¶ 8.6.

387. *See supra* pp. 607-19.

### b. Definition of Domestic Industry

The essence of the United States' argument was that because Article 6.2 of the ATC permits a Member to impose safeguards against an imported good that is "like and/or directly competitive" with the domestic product, the domestic industry properly excluded vertically integrated producers. Vertically integrated producers manufacture a like product (yarn), but such a product is not directly competitive because it is for their own consumption rather than for sale in the "merchant" market. Thus, the United States was correct in limiting its investigation to like products, those which were for sale in the merchant market. In this regard, the Panel erred in relying on GATT Article III jurisprudence, rather than concentrating on the ATC provisions.

Article III:2 uses different language—"directly competitive or substitutable," which is not the same. For the United States, context was also important. In particular, the ATC carefully balanced the interests of textile importing and exporting Members, and the Panel had disturbed that balance. The Panel also presumed that imported yarn was competing with vertically integrated producers, even though historically those producers have purchased very little yarn from the merchant market.

Pakistan contended that the Panel's determination to include vertically integrated United States producers in the domestic industry was correct. These firms were directly competitive even if they were not competing at the present time. As the Appellate Body noted in *Korea - Alcoholic Beverages*, in interpreting similar language in the Safeguards Agreement, products are competitive if they are interchangeable in the market. Also, according to the plain meaning of the word "produce," the vertically integrated firms are producers of yarn as well as fabric. Such an establishment could suffer injury from rising yarn imports or rising fabric imports.

For India, it was clear that, under the ATC, the domestic industry was defined as the "entire" domestic industry producing like and/or directly competitive products. India agreed with Pakistan that vertical integration is one form of adjustment to import competition in textiles and should not be used as a means to make it easier to justify safeguards under the ATC.

### c. Serious Damage

The United States challenged the Panel's imposition of a requirement that serious damage or actual threat thereof be attributed to all Members causing such damage. Article 6 of the ATC does not require this. Causation is determined on the basis of total rather than individual imports; the issue here is attribution of damage. Article 6, unlike the Safeguards Agreement,<sup>388</sup> is effectively a non-most-favored-nation

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388. See ATC art. 5.2(a) (providing, subject to certain exceptions, that "In cases in which



safeguard. Transitional safeguards under Article 6.2 are to be applied on a Member-by-Member basis. Thus, there is no requirement that serious damage be attributed to all exporters that may individually cause or contribute to serious damage. An approach requiring safeguards to be applied to all Members meeting the Article 6.4 criteria would also conflict with the Article 6.6 requirement that any safeguards be applied “as sparingly as possible.”

The United States also emphasized that the Article 6 safeguard mechanism in the ATC intentionally incorporated a different approach from that provided in the Safeguards Agreement, noting that the former was a transitional agreement that ultimately would be integrated into the GATT 1994, but had not been as of yet. The Safeguards Agreement, under its Article 11.1(c), did not apply to transitional safeguard measures under the ATC. The United States also argued, as justification to the Panel for applying restraints to Pakistani yarn alone, that Pakistani yarn imports were surging much faster than those from any other sources—283.2 percent compared to 73 percent from other sources— and being sold at lower prices—26.2 percent lower than average United States market prices and 20 percent lower than average world prices.<sup>389</sup>

Pakistan, of course, disagreed. Just because Article 6.4 refers to “Member-by-Member” and uses the term “attribute” did not mean that the importing Member could pick and choose arbitrarily which exporting Members would have serious damage attributed to them. Attribution of serious damage requires a comparison of imports to other sources, as the panel in *United States - Underwear* had stated. All potential sources of serious damage must be assessed under Article 6.4. The provision is not intended to permit an importing Member to shift burdens from one exporting Member (e.g., Mexico) to others (e.g., Pakistan), forcing one exporting Member to accept a disproportionate share of the effects of safeguards. More generally, Pakistan argued that the Panel was correct in drawing upon the GATT 1994, where the ATC is silent. India shared Pakistan’s views.

### ***Rationale and Holdings:***<sup>390</sup>

#### **1. The Panel Must Use only the Data Available to the Competent Authority in Making its “Objective Assessment” Under DSU Article 11**

The United States had relied for its December 1998 determination on official

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a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned.”)

389. Report of the Panel, *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R ¶¶ 4.158-4.159 (May 31, 2001) [hereinafter *Cotton Yarn Panel Report*].

390. *Cotton Yarn Appellate Body Report*, *supra* note 380, ¶¶ 62-127.

United States government data for periods through 1997, but on data provided by the industry (American Yarn Spinners Association) for January through August 1998, given the unavailability of government data until 1999. By the time of the Panel proceeding, United States government data was available for 1998, tending to show that imports had decreased rather than increased. The Panel utilized this data, but it did not conclude that the new data vitiated the United States' serious damage finding.

The Appellate Body was careful to indicate what issues it was *not* addressing: whether a panel may look at evidence relating to facts subsequent to the determination of the competent authority; whether it may consider evidence existing before the determination that was not submitted to the importing Member; or whether the competent authority could have taken additional investigative steps to gather more evidence. In all those cases, the answer is yes. As the Appellate Body stated:

[T]he question before us is whether a panel is entitled, in assessing the due diligence of an importing Member in making a determination under Article 6.2 of the ATC, to take into account evidence that could not possibly have been examined by that Member when it made that determination.<sup>391</sup>

The standard of review is set out in Article 11 of the DSU, which requires "an objective assessment of the facts of the case and the applicability of and conformity with the relevant agreements." This standard, according to the decision in *EC - Hormones*, "is *neither de novo review* as such, *nor total deference*," but rather the "objective assessment of the facts."<sup>392</sup> As the Appellate Body further explained, "although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities."<sup>393</sup>

While this was the first instance in which the Appellate Body had considered a panel's standard of review under Article 11 of the DSU in a dispute under the ATC, a panel has considered the issue in *United States - Underwear*, and the Appellate Body has done so in *Argentina - Footwear*, *United States - Lamb Safeguard* and *United States - Wheat Gluten Safeguard*. The Appellate Body summarized this jurisprudence:

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also

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391. *Id.* ¶ 67.

392. *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R. WT/DS48/AB/R, ¶ 117 (Feb. 13, 1998).

393. *Lamb Meat* Appellate Body Report, *supra* note 359, at n.41, ¶ 106.

consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgment for that of the competent authority.<sup>394</sup>

According to the Appellate Body, these principles articulated under the Safeguards Agreement are also applicable to the ATC. Because Article 6 does not require that all interested parties participate, the "exercise of due diligence is all the more important." However, requiring the competent authority to consider evidence that does not exist goes too far; the determination can be based only on "the facts and evidence which existed at the time the determination was made." Otherwise, the right provided to the importing Member under Article 6 would be undermined.

Having so held, the Appellate Body stated that it refused to express a view on the question as to whether the safeguard should be withdrawn if post-determination evidence reveals that the determination was "based on such a critical factual error that one of the conditions required by Article 6 [that is, rising rather than falling imports] turns out never to have been met." It noted, however, the existence of "the 'pervasive' general principle of *good faith* that underlies all treaties." In other words, if the United States receives data that indicates that the conditions used to justify the imposition of the safeguard did not in fact exist, it is at least morally bound to terminate the safeguard.

## 2. The "Domestic Industry" Under ATC Article 6.2 Does Include the Integrated Producers of Yarn and Fabric

The dispute was over the exclusion or inclusion of yarn produced by integrated textile producers in the United States' definition of "domestic industry." If the universe of United States production includes captive production of yarn rather than simply "merchant" production, the impact of imports from Pakistan (or elsewhere) will be correspondingly smaller. Article 6.2 of the ATC requires a comparison to the "domestic industry producing like and/or directly competitive products." This, according to the Appellate Body, means that the definition is product-oriented rather than producer-oriented. Also, "producing" means doing so for commercial purposes, whether for the merchant or any other segment of the market.

Since there was no disagreement that the yarn from Pakistan and the yarn produced in the United States were "like products," the only question was whether they were also directly competitive. Based on *Korea - Alcoholic Beverages*,<sup>395</sup> whether an article is also directly competitive depends not only on current

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394. *Cotton Yarn* Appellate Body Report, *supra* note 380, ¶ 76.

395. See Appellate Body Report, *Korea - Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, ¶¶ 114-115, 117 (Feb. 17, 1999).

competitive conditions, but extends as well to *potential* competition. Products are directly competitive when they are interchangeable or offer alternative ways of satisfying a need. The fact that *Korea - Alcoholic Beverages* interpreted Article III of GATT, rather than Article 6.2 of the ATC, as the United States argued, is not persuasive. Even though Article 6.2 does not contain the term “directly substitutable,” the Appellate Body treated “directly competitive” and “directly substitutable” without distinction, so the comparison of Article III and Article 6.2 is valid. (So much for giving meaning to every term in an agreement!)

For the Appellate Body, Pakistani yarn and yarn produced by vertically integrated textile producers in the United States was directly competitive. Even though these producers purchased very low volumes of merchant yarn in recent years, a “static” view of the market is not appropriate. Since integrated fabric producers compete with independent producers, they must consider the possibility of purchasing merchant yarn in place of making their own if it would be cheaper to do so. Also, if a *force majeure* event were to occur, they might enter the merchant market for yarn. If vertically-integrated-producer yarn is excluded from the domestic industry, the size of that industry would vary constantly whenever there is a change in the market, as when a fabric producer purchases a yarn producer. Even though vertically-integrated-producer yarn is excluded from the domestic industry, that yarn would benefit from safeguards, for both merchant sales and production for internal consumption. Finally, if vertically-integrated-producer yarn is excluded, this would imply that imported yarn from a related company should be excluded from the comparison; yet the current safeguard applies to all imports.

The Appellate Body had more trouble distinguishing *United States - Hot Rolled Steel*. In that case, the Appellate Body stated that captive steel production was “shielded from direct competition;” however, this statement “did not mean that steel produced in the captive market segment is not directly competitive with imported steel destined from the merchant market.”<sup>396</sup> Observers might find it more difficult to distinguish between “direct competition” and “directly competitive” as two distinct concepts. In any event, the Appellate Body held that Pakistani yarn and vertically-integrated-producer yarn were directly competitive, and the latter was thus improperly excluded from the analysis. Since this was the case, there was no need to decide to address the proper interpretation of the connectors in Article 6.2, “like *and/or* directly competitive.”

### 3. Pakistan Does Not Take the Fall Alone Where There is Another Major Producer (Mexico)<sup>397</sup>

Pakistan was hit with safeguards on its exports of cotton yarn to the United States

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396. *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, *supra* pp. 554-607, ¶¶ 198, 207.

397. *Cotton Yarn Appellate Body Report*, *supra* note 380, ¶¶ 106-127

market; Mexico, also a major supplier, was not. There was no disagreement that yarn imports from Mexico also had increased sharply and substantially, although as noted earlier, the rate of surge for Pakistan was higher than for any other market. Under these circumstances, could the United States have applied safeguards to Pakistan without “making a comparative assessment of the imports from Pakistan and Mexico and their respective effects?” The Panel essentially decided that, under Article 6.4 of the ATC,<sup>398</sup> the United States was obligated to undertake this examination, and it failed to do so.<sup>398</sup>

The Appellate Body began by distinguishing three distinct elements of the process, based on Article 6 of the ATC: causation of serious damage or actual threat thereof; attribution of the damage to a Member or Members; and application of transitional safeguard measures. Since Pakistan did not challenge causation, the issue before the Appellate Body is attribution. This in turn required a three-step analysis: assessment of the existence of serious damage to the industry, or threat thereof; determination as to whether there is a “sharp and substantial increase in imports” as required under Article 6.4; and establishment of a causal link. Attribution must thus be confined to the Members whose imports have shown such an increase, and there must be a comparative analysis if the facts show that imports from more than one member demonstrate this increase. This is because under a reasonable interpretation of Article 6, if the imports from more than a single Member are causing serious damage, “only that *part* of the total damage which is actually caused by imports from such a Member that can be attributed to that Member.”

The United States erred by attributing the totality of serious damage to Pakistan, unless it could be shown that the imports from Pakistan caused all the serious damage. In doing so, according to the Appellate Body, the United States had acted inconsistently with general international law rules on state responsibility, which limit countermeasures to those that are commensurate with the injury suffered, and with Article 22.4 of the Dispute Settlement Understanding, which requires that any suspension of concessions be “equivalent to the level of nullification or impairment.” The United States’ action of imposing safeguards only on Pakistan, even though Mexican source imports were a partial cause of serious damage, was disproportionate, and effectively constituted “punitive” damages that are not justified under Article 22.4.

What the United States should have done, according to the Appellate Body, was to conduct a comparison of the level and market share of yarn imports from one Member (Pakistan) *individually* with those from the other Member (Mexico) that have also increased sharply and substantially. In that manner, the effects of imports from each of the two nations could be isolated and analyzed. By failing to do this, the United States violated Article 6.4 of the ATC. (The Appellate Body does not decide whether there must be attribution to all Members— rather than just Pakistan and Mexico—whose imports may have caused serious damage or actual threat thereof.)

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398. See *Cotton Yarn* Panel Report, *supra* note 389, ¶ 8.1(b).

### Commentary:

While this case may not be of major significance, given that the ATC is essentially a transitory agreement,<sup>399</sup> it does deal with several recurring themes of Appellate Body jurisprudence. First, it illustrates the continuing struggle of panels and the Appellate Body to define the proper scope of review of competent authority actions, given the relatively limited guidance (“objective applicability of and conformity with the relevant covered agreements”) provided in Article 11 of the DSU. In retrospect, it would have been helpful if the drafters of the WTO agreements had provided more specific guidance to the panels and Appellate Body, but they appear to have done this only in the case of the Antidumping Agreement.<sup>400</sup>

Consistently with its approach to safeguards under the Safeguards Agreement, the Appellate Body in interpreting Article 6.2 and 6.4 of the Agreement on Textiles and Clothing is insisting on an objective definition of “domestic industry” and a careful analysis of the imports to assure that serious damage is attributed to the imports that are causing the damage, rather than to a single Member’s imports. This again raises, in a context somewhat different from that in *United States - Wheat Gluten Safeguard*, United States’ efforts to provide more favorable treatment to its NAFTA partners, in this case Mexico. NAFTA provides special provisions for “bilateral emergency actions” in the textile sphere, which may provide treatment more favorable than that provided to other WTO Members in the ATC.<sup>401</sup> Under NAFTA, if there is a conflict between a Party’s NAFTA obligations, and those under GATT, the NAFTA obligations generally prevail.<sup>402</sup> Pakistan intentionally refrained from raising the question as to whether the United States, under GATT Article XXIV, was entitled to exempt Mexico from the application of the safeguard. This decision was apparently made because of Pakistan’s belief that this would have required the Panel to examine the relationship between Article XXIV and the ATC, resulting in a possibly substantial delay in the panel process.<sup>403</sup> Thus, the Panel and the Appellate Body decided the issue under Article 6 of the ATC alone.

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399. The ATC provides that “This Agreement set outs provisions to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994.” ATC, *supra* note 381, art. 1.1.

400. See GATT, *supra* note 346 (discussing the standard of review in the WTO Antidumping Agreement).

401. NAFTA, Dec. 8, 1993, Annex 300-B, Section 5: Bilateral Emergency Actions (Quantitative Restrictions), available at [http://www.nafta\\_sec\\_alena.org/english/index.htm](http://www.nafta_sec_alena.org/english/index.htm).

402. NAFTA, Dec. 8, 1993, art. 103.2, available at [http://www.nafta\\_sec\\_alena.org/english/index.htm](http://www.nafta_sec_alena.org/english/index.htm).

403. See *Cotton Yarn* Panel Report, *supra* note 389, ¶ 4.170.